



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF WISCONSIN,
WITH
TABLES OF THE CASES AND PRINCIPAL MATTERS.

O. M. CONOVER,
OFFICIAL REPORTER.

VOLUME XXXIX.
CONTAINING CASES DETERMINED AT THE AUGUST TERM, 1875, AND THE
JANUARY TERM, 1876.

CHICAGO:
CALLAGHAN & COMPANY,
LAW PUBLISHERS.
1876.

Entered according to Act of Congress, in the year eighteen hundred and seventy-six,

By CALLAGHAN & CO.,

In the office of the Librarian of Congress, at Washington, D. C.

ATWOOD & CULVER, STEREOTYPERS AND PRINTERS,
MADISON, WISCONSIN.

JUDGES OF THE SUPREME COURT

OF THE

STATE OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

EDWARD G. RYAN, CHIEF JUSTICE.

ORSAMUS COLE, }
WILLIAM P. LYON, } ASSOCIATE JUSTICES.

Attorney General, A. SCOTT SLOAN.

Clerk, LA FAYETTE KELLOGG.

MEMORANDUM.

THIS volume contains all the cases, not previously reported, which are ripe for reporting at this date; including all those finally determined here before the sixth of June, ult. Under the statute and rules of court, cases of the latter date are still open to motions for rehearing.

All causes *finally argued* at the August term, 1875, are reported as of that term; although all except four of those included in the present volume were determined on or after the first of February of the current year.

In accordance with the views of the court, where there was oral argument here, the counsel who appeared here are alone named in the report of the argument. Where a cause was submitted on briefs, the names of counsel are given as found upon the briefs.

MADISON, July 1, 1876.

O. M. C.

TABLE

OF THE

NAMES OF CASES

REPORTED IN THIS VOLUME.

<i>Allen and another, Cary and another v.</i>	481
<i>Andrews, Executrix, v. Jenkins and others.</i>	476

INSTRUCTIONS TO JURY. (1) When plaintiff not injured by erroneous instructions.

SALE: PERSONAL PROPERTY. (2) When purchaser takes free from prior incumbrance. (3) Case stated and rule applied.

EVIDENCE. (4) Parol evidence admissible to show that conveyance of personalty was to secure advances.

<i>Baass v. The Chicago & Northwestern Railway Company</i>	296
--	-----

FORECLOSURE OF MORTGAGE. Parties defendant. Right of mortgagor to have priority of its trust deed to a third person determined in the case.

<i>Baker v. Supervisors of Columbia County.</i>	444
---	-----

TAX CERTIFICATES: STATUTE OF LIMITATIONS. (1) When statute may be pleaded by supervisors, on appeal from their decision. (2) Tax certificates void when cost of revenue stamps included. (3, 4) When statute begins to run as to actions on certificates.

<i>Barber v. Rukeyser.</i>	590
------------------------------------	-----

EQUITY: LACHES. When relief will not be granted against judgment at law.

<i>Baraboo, Town of, Matthews v.</i>	674
--	-----

Bass v. The Chicago & Northwestern Railway Company 636

EXCESSIVE DAMAGES: COMPENSATORY AND EXEMPLARY DAMAGES. (1, 2) Setting aside verdict for excessive damages. (3) Case stated; damages for personal injuries held excessive. (4) Effect of former verdict for same sum. (5) Exemplary damages, when allowable. (6) When verdict must be treated as for compensatory damages only.

Berrinkott v. Traphagen and another, imp...... 219

BOND. (1) Penalty or liquidated damages? (2) Exercise of obligee's option on breach of bond, and notice thereof to obligor.

Berry and others, Kelly v...... 669*Bishop, Greening v.*..... 552*Brewster and another v. Carmichael.*..... 456

REPLEVIN: LOGS: DAMAGES. (1) When court may direct verdict for plaintiff in replevin. (2) Proof of value of stumpage rejected, and statutory rule of damages applied. (3) Identification of the property. (4) When action of replevin treated as action of trover.

Brookins, Mc Williams v...... 334*Brown v. Worden.*..... 432

HUSBAND AND WIFE: PLEADING. Liability of husband for necessities furnished wife depends on circumstances, which must be stated in complaint.

Burrington, Adm'x, Tyler v...... 376*Callahan, Magoon v.*..... 141*Carmichael, Brewster and another v.*..... 456*Carpenter v. The State.*..... 271

CONSTITUTIONAL LAW. (1) Query as to legislative power to submit claim against state to arbitration. (2, 3) Legislative provision for paying contractor with state a compensation determined outside of his contract, invalid.

Cary and another v. Allen and another...... 481

LIBEL. (1) Requisites of complaint where words charged are of uncertain meaning. (2, 3) What words are libelous.

*Chicago, Milwaukee & St. Paul Railway Company,
Lemke v.*..... 449

<i>Chicago & Northwestern Railway Company, Baass v. .</i>	296
<i>Chicago & Northwestern Railway Company, Bass v. . .</i>	636
<i>Church v. Smith, impleaded.</i>	492

LAND CONTRACT. Rights of vendor: Rights of his assignee of a part or the whole of the purchase-money notes, after a strict foreclosure of the purchaser's equity.

<i>City of Milwaukee, Herzer v.</i>	360
<i>City of Milwaukee, Seehawer v.</i>	409
<i>City of Mineral Point and another, Wilson v.</i>	160
<i>Cleaver and others v. Cleaver and others.</i>	96

WILL. (1, 2) Lapse of devise or legacy to a wife, who dies before her husband, leaving issue surviving him.

COSTS: (3) On appeal from an order of distribution in probate.

<i>Columbia County, Supervisors of, Baker v.</i>	444
<i>Covert, imp., Pierce and others v.</i>	252
<i>Crawford County, Supervisors of, State ex rel. Posey v. .</i>	596
<i>Crocker, Harrison, Judd & Co. v.</i>	68

<i>Dean, Irish v.</i>	562
<i>Dodge County Mutual Insurance Company, Gorton v. .</i>	121
<i>Dodge County Mutual Insurance Company, Kirk v. . .</i>	138
<i>Dunn, Pringle and others v. (Motion for rehearing). .</i>	435
<i>Dutcher v. Dutcher</i>	651

DIVORCE: RESIDENCE OF PLAINTIFF: LIMITATION OF ACTION:

PLEADING: JUDICIAL DISCRETION IN DIVORCE: COSTS. (1-3)

Length and character of residence required of plaintiff in divorce.

(4-7) Nonresidence a personal disability. How pleaded. (8)

Statutory limitation of the action. (9, 10) How limitation to be

pleaded. Effect of general denial under the code. (11, 12) Judi-

cial discretion in aid of the policy of divorce statutes. (13) Rules

of pleading and practice relaxed only to protect public interest.

(14) Costs.

<i>Eldred, Stowell and others v.</i>	614
--	-----

<i>Field, Merriam v.</i>	578
<i>Filkington, Johnson v.</i>	62

<i>Flanders v. McDonald</i>	288
<i>Flom, Oleson v.</i>	75
<i>Galena & Southern Wisconsin Railway Company,</i> <i>Redmond v.</i> 426	
<i>Goodell, Miss Lavinia, Motion to admit to the Bar of</i> <i>this Court</i>	232
CONSTITUTIONAL LAW. Women not admitted to the bar of this court.	
<i>Gorton v. The Dodge County Mutual Insurance Com-</i> <i>pany</i>	121
INSURANCE. Insurer not liable when premium note unpaid.	
<i>Greening v. Bishop</i>	552
BILL OF EXCEPTIONS. Presumption when it is not certified to contain all the evidence.	
<i>Griffiths v. Kellogg</i>	290
PROMISSORY NOTE. (1) When maker, whose signature is obtained by fraud, not liable, even to innocent holder. (2) Query, whether purchase at discount, without indorsement or inquiry, is <i>bona fide</i> . (3) Finding of jury as to maker's negligence in signing, final.	
<i>Grootemaat v. Tebel</i>	576
VACATING JUDGMENT. Defendant's neglect held not excusable.	
<i>Hall v. The State</i>	79
CONSTITUTIONAL LAW. Geological commissioners under act of 1857, public officers; their contract with the state terminated by unconditional repeal of the act.	
<i>Hammer v. Hammer</i>	182
REAL ESTATE: EJECTMENT: EVIDENCE. (1) Allotment of land under act of congress gives equitable title. (2) Evidence of such allotment, and of possession under it, in ejectment.	
<i>Hanchett, Meyer and another v.</i>	419
<i>Harrison, Judd & Co. v. Crocker</i>	68
(1) Exceptions. (2) Waiver of breach of warranty by giving notes for full price. (3) Instructions as to burden of proof.	

<i>Hay v. Lewis and others</i>	364
PRACTICE. (1-3) Correcting record on appeal. Printed case.	
SPECIFIC PERFORMANCE: SALE OF LAND. (4, 5) When agreement to sell will not be specifically enforced.	
<i>Hayden, Keenan v.</i>	558
<i>Heath v. The Silverthorn Lead Mining & Smelting Company and others</i>	146
PRIVATE CORPORATION. (1) Estopped to deny validity of contract made for it by its <i>de facto</i> officers.	
BILLS AND NOTES. (2) Who protected as purchaser for value.	
PLEDGE. (3) Pledgee of stock as collateral, not bound to take it in payment. (4) Act of pledgee in voting on such stock, held not a conversion.	
JUDGMENT IN FORECLOSURE. (5) Error to adjudge void a mortgage subsequent to plaintiff's whose validity is not contested by the mortgagor.	
RULES OF S. C. (6) What printed case and briefs must contain.	
<i>Herzer v. The City of Milwaukee</i>	360
MUNICIPAL CORPORATIONS. Waiver of damages for change in grade of street.	
<i>Hogan and others, McRae v.</i>	525
<i>Hopkins v. Hopkins</i> . (First Appeal.).....	165
Presumption on appeal.	
<i>Hopkins v. Hopkins</i> . (Second Appeal.).....	166
Superfluous appeal.	
<i>Hopkins v. Hopkins</i> (Third Appeal.).....	167
DIVORCE: CUSTODY OF CHILDREN. ALIMONY. (1) Collusion between husband and wife to procure divorce, a fraud upon the court.	
(2) Effect of husband's agreement not to oppose divorce, not decided. (3) Burden of proof on party seeking to set aside divorce.	
(4) Courts limited to statutory powers in divorce cases. (5) Court cannot give custody of children to stranger. (6) Amount of alimony.	
<i>Hull, Adm'r, v. The Northwestern Mutual Life Insurance Company</i>	397
LIFE INSURANCE. Construction of policy: Forfeiture clause: Premium notes: Application of dividends.	
<i>Hyde, Law v.</i>	345

<i>In re Goodell</i>	232
<i>In re Kindling</i>	35
<i>In re Mosness</i>	509
<i>In re Murphey</i>	286
<i>Irish v. Dean</i>	562

CONTRACTS: EVIDENCE. (1, 2) Rights of parties under contract for supplies, silent as to its duration. Parol evidence inadmissible to limit the time.

REVERSAL OF JUDGMENT. (3) No reversal for error by which appellant was not injured.

<i>Jenkins and others, Andrews, Executrix, v</i>	476
<i>Jennings v. Lyons</i>	553

CONTRACTS. (1) When for personal services. (2-4) When sickness excuses full performance of entire contract, and permits recovery on a *quantum meruit*.

<i>Johnson v. Filkington</i>	62
------------------------------------	----

CONTRACT. (1) Revocation of order for work and materials. Presumption.

EVIDENCE: (2) Properly rejected where it does not tend to prove the cause of action alleged.

AMENDMENT OF COMPLAINT. (3) Not admissible to substitute new cause of action.

<i>Johnson v. The Northwestern National Insurance Company</i>	87
---	----

MARINE INSURANCE. (1, 2) Construction of phrase, "Loading off-shore prohibited," in marine policy. (5) Rule of construction.

EVIDENCE. (3, 4) Extent to which parol evidence admissible to explain a policy of marine insurance.

<i>Johnson and others, Schattschneider v</i>	387
<i>Johnson and others, Scheike v</i>	384
<i>Joliffe v. The Madison Mutual Insurance Company</i> ..	111

FIRE INSURANCE. (1-3) Conditions in policy; validity; waiver. (4-7) Forfeiture of policy. (4) Waiver of forfeiture. (5, 6) Declaration of option must be unconditional. (7) Who may declare forfeiture.

<i>Jones, Thomas v</i>	124
------------------------------	-----

<i>Jones and another, Adm'rs, v. Williams</i>	300
---	-----

Appropriation of payments; when doctrine inapplicable.

<i>Kaine and others, Supervisors of Omro v.</i>	468
---	-----

<i>Keenan v. Hayden</i>	558
-------------------------------	-----

EVIDENCE: COURT AND JURY. (1) When question of *scienter* to be submitted to the jury in action for injuries from ferocious dog. (2) Court not bound to instruct jury as to the effect of one among several facts bearing on the question.

<i>Kellogg, Griffiths v</i>	290
-----------------------------------	-----

<i>Kelly v. Berry and others</i>	669
--	-----

SALE OF LOGS. (1) Waiver by vendee of objection to delivery on account of liens on the property. (2) Contract of sale construed; appraisal of logs by third person; no inspection required.

REVERSAL OF JUDGMENT. (3) No reversal for casual remark of judge, not injurious to appellant.

<i>Kelly, Pierce v.</i>	568
-------------------------------	-----

<i>Kirk v. The Dodge County Mutual Insurance Com- pany</i>	138
--	-----

BILLS AND NOTES: When negotiable.

<i>Kindling, In re. (Habeas Corpus)</i>	35
---	----

CONSTITUTIONAL LAW: ARREST: BAIL: DETENTION AFTER JUDGMENT. (1, 2) Judges of courts of record may make chamber orders to hold to bail. (3) Upon affidavit showing the tort for which action is brought. (4, 5) Detention of defendant on such order after judgment against him.

<i>Laroe v. Hyde.</i>	345
-----------------------------	-----

EQUITY: EJECTMENT: PLEADING: PRACTICE. (1) Forfeitures not enforceable in equity. (2, 3) Suit in equity changed to ejectment by consent. (4) Special complaint in ejectment setting out plaintiff's title. (5) Lacking averments supplied here by stipulation. (6) COUNTERCLAIM in ejectment for release of plaintiff's claim of title. (7) DEMURRER to counterclaim goes back to complaint.

DEED. (8) Omission of grantee's name immediately after words of grant, how cured. (9, 10) Condition subsequent irregularly inserted. (11, 12) Condition subsequent construed.

Lemke v. The Chicago, Milwaukee & St. Paul Railway Company..... 449

PRACTICE: SPECIAL VERDICT: APPEALABLE ORDER. (1) Special verdict inconsistent with general verdict must prevail. (2) Plaintiff not injured by order arresting judgment on general verdict. (3) Appealable order.

COMMON CARRIER. (4) Railway not liable for loss of goods by fire after reasonable time to remove them from depot. (5) Goods presumed ready for delivery at any time after receipt at destination. (6) Reasonable time to remove goods, when question for jury; when for court. (7) Defendant not liable on the case stated. (8) Absence of consignee does not extend time of liability of carrier.

Lennon, Russell and another v...... 570

Lewis and others, Hay v...... 364

Likens v. McCormick and another...... 313

PRACTICE: OPENING JUDGMENT: SERVICE BY PUBLICATION.

(1) Defect of jurisdiction waived by neglect of defendants to appeal from order to answer on vacating judgment. (2) Statute authorizing service by publication must be strictly followed. (3) When service by mailing summons and complaint invalid. (4) When personal service on one of two defendants without the state insufficient. (5) Defendants irregularly served may have default opened.

Liverpool, London & Globe Insurance Company and another, Reeve and another v...... 520

Lyons, Jennings v...... 553

Madison Mutual Insurance Company, Joliffe v...... 111

Madison Mutual Insurance Company, Sherman v..... 104

Magoon v. Callahan..... 141

FORECLOSURE OF LAND CONTRACT: VACATING JUDGMENT. (1) Defendant not required to deposit money alleged to have been paid. (2) Allowed one year for making payment. (3) Required to pay sum admitted to be due as a condition of opening judgment.

Marsh v. Pugh..... 507

EVIDENCE. Contract to build house according to written specifications; oral proof of plan referred to in specifications.

Matthews and wife v. The Town of Baraboo..... 674

VARIANCE. AMENDMENT. (1) Amendment at trial. When variance waived and when disregarded after verdict.

HIGHWAYS. (2) Extent of liability of towns for defective highways.

McCormick and another, Likens v...... 313*McDonald, Flanders v.*..... 288*McRae v. Hogan and others*..... 529

CONSTITUTIONAL LAW. Uniformity of town and county government.

Mc Williams v. Brookens..... 334

LAND CONTRACT. When vendor excused from tendering deed.

Menk v. Steinfort..... 370

REVERSAL OF JUDGMENT. (1) Error in admitting evidence cured.

(3) Inadmissible evidence rejected on erroneous grounds. (5) Error in charge cured.

EVIDENCE: WITNESS. (2, 4) Husband as agent of wife.

Merriam v. Field..... 578

(1) Sale of goods: implied warranty. (2) Error in instructions not cured. (3) Exceptions filed after trial. Act of 1874.

Merrill and others v. Nightingale and others..... 247

CONTRACT: GOODS MADE TO ORDER. (1) Breach of warranty: Rights of purchaser.

EVIDENCE. (2) When maker, in action for contract price, may prove actual value. (3) Order of proof under control of trial court.

(4) Rebutting evidence as to breach of warranty.

REVERSAL OF JUDGMENT. (3) No fatal error where appellant not injured. (5) When verdict will not be disturbed.

Meyer and another v. Hanchett..... 419

AGENCY: FRAUD. (1, 3) When one acting as vendor's agent precluded from claiming for services as agent of vendee.

PRACTICE. (2) Error in rejecting material evidence not cured by a correct statement of the law in the charge.

Milwaukee, City of, Herzer v...... 360*Milwaukee, City of, Seehawer v.*..... 409*Mineral Point, City of, and another, Wilson v.*..... 160*Moe v. Moe. (Three Appeals.)*..... 308

CHANGE OF VENUE: STAY OF PROCEEDINGS: APPEAL: DIVORCE:

TEMPORARY ALIMONY. (1) Right of defendant in divorce to have venue changed to his county, even when it must afterwards be removed thence. (3) Demand of such change does not stay proceedings. (2) Double appeal for same relief. (4) Record on appeal from order for temporary alimony. (5) Power of court to which the cause is removed, over previous allowances for temporary alimony, etc.

Motion to admit to the Bar of this Court, Ole Mosness, Esq. 509

Nonresident attorneys not admissible to the bar of a court of this state.

Murphey, In re. 286

CRIMINAL CONTEMPT. Judgment or order not reviewable on appeal.

Nightingale and others, Merrill and others v. 247

Northrup v. Trask. 515

PERSONAL PROPERTY: RIGHT OF ACTION. (1) Presumption that dwelling forms part of realty. (2) House being removed becomes personalty while *in transitu*. (3) One who has no possession not guilty of conversion. (4) When vendor in land contract can not maintain trover or replevin for house. (5) Vendor's remedy by proceeding to stay waste.

Northwestern Mutual Life Insurance Company, Hull, Adm'r, v. 397

Northwestern National Insurance Company, Johnson v. 87

O'Dowd, Pepper and others v. 538

Oleson v. Flom. 75

Reversal of judgment.

O'Malley and others, Stahl v. 328

Omro, Supervisors of, v. Kaime and others. 468

Peckham, Ex'trix, Smith and another, Ex'rs, v. 414

Perry v. Williams. 339

Rights and liabilities of receptor for property seized on process.

Pepper and others v. O'Dowd..... 538

STATUTE OF LIMITATIONS: ADVERSE POSSESSION. Limits of constructive adverse possession defined.

Phoenix Lead Mining & Smelting Company v. Sydnor and others..... 600

BETTERMENT ACT. (1) Applicable to recovery of undivided interest. (2) Remedy by independent action, under sec. 33. (3) Proceeding in ejectment suit must be commenced before judgment.

Pierce and others v. Covert, imp...... 252

PARTNERSHIP: DISSOLUTION: REAL ESTATE. How real property to be disposed of on decreeing a dissolution, where title was taken by the partners in their individual names, and the undivided share of one conveyed to a stranger; there being other assets sufficient.

Pierce v. Kelly, imp..... 568

PRACTICE IN SUPREME COURT. Rehearing. When this court loses appellate jurisdiction of a cause.

Pike v. Vaughn and others..... 499

SALE: DELIVERY: STATUTE OF FRAUDS. (1) Title to logs does not pass until measured, unless so agreed. (2) Question of delivery. Case stated. (3) Parol contract, not executed by delivery, void under statute of frauds, notwithstanding subsequent payments.

PRACTICE. (4) Practice on remanding judgment when evidence not before this court.

Pitzner v. Shinnick..... 129

NEGLIGENCE: RAILROAD CROSSINGS. (1) Recovery not allowed for injury of which plaintiff's negligence was the proximate cause. (2) The rule applied to killing of cattle where defendant has left open gate at railroad farm-crossing. (3) Questions of negligence for the jury, unless proof conclusive.

Power v. Rockwell..... 585

JUDGMENT: PRESUMPTION: COSTS. (1, 4) Presumptions to sustain judgment for costs, on appeal.

JUSTICES' COURTS. (2, 3) What actions cognizable therein.

DISCRETIONARY COSTS. (5) In circuit court, when case cognizable by J. P. When verification of original complaint sufficient.

Pringle v. Dunn and others. (Motion for rehearing.) . 435

PRACTICE: REHEARING AFTER JUDGMENT. (1) General rule as to

rehearing after judgment. (2-4) Rehearing in this court, after judgment on appeal.

Pugh, Marsh v. 507

Redmond v. The Galena & Southern Wisconsin Railway Company. 426

JUSTICE'S COURT. (1) Jurisdiction of statutory action against railroad company, for work in building road.

RAILROAD COMPANY. (2) Liable in statutory action to employees of contractor in the second degree; (3) although nothing then due such contractor.

Reeve and another v. The Liverpool, London & Globe Insurance Company and another. 520

BURDEN OF PROOF. Onus on defendant in action by indorsee of commercial paper taken in regular course of business, to show not only fraud but that plaintiff is chargeable with notice of it.

Rockwell, Power v. 585

Robertson, Swearingen v. 462

Rukeyser, Barber v. 590

Russell and another v. Lennon, 570

Exemption from execution against partnership property.

Schattschneider v. Johnson and others, 387

CHANGE OF VENUE. (1) Appealable order. *Res adjudicata*. Denial of one motion does not bar a second. (2) Discretion of trial court as to change of venue for prejudice of the people of the county.

Scheike v. Johnson and others. 384

Reversal of judgment.

Seehawer v. The City of Milwaukee. 409

CHANGE OF VENUE for prejudice of judge. When applicant's affidavit upon belief, conclusive, and when not so.

Sellers v. The Union Lumbering Company. 525

HIGHWAYS. (1) What rivers of this state are highways?

STATUTES: FRANCHISE. (2) Right to take tolls a franchise. (3) Statute granting franchise must designate a certain grantee.

<i>Shepardson, Yates v.</i>	173
<i>Sherman v. The Madison Mutual Insurance Company,</i>	104

APPEAL. (1) Intendment as to facts. (2) Conclusion of law treated as such, though contained in finding of facts.

FIRE INSURANCE. (3) Waiver of condition as to additional insurance. (4) Rule for adjustment of losses under nonconcurrent policies.

<i>Shinnick, Pitzner v.</i>	129
<i>Siegbert and others v. Stiles.</i>	533

CONTRACTS: LEGAL HOLIDAYS. (1, 2) Contracts maturing by their terms on a legal holiday or Sunday, held to mature the next preceding day.

CONTRACTS: DAMAGES: MARKET PRICE: EVIDENCE. Evidence of market price at McGregor, Iowa, admitted to show market price at Prairie du Chien, in this state.

<i>Silverthorn Lead Mining & Smelting Company and others, Heath v.</i>	146
<i>Smith, imp., Church v.</i>	492
<i>Smith and another, Ex'rs, v. Peckham, Ex'tris.</i>	414

ACTION BY FOREIGN EXECUTOR: PLEADING: PROBATE COURT.

(1) When foreign executor may sue here. (2) How plaintiff's mere disability must be pleaded. (3) Query as to reversal of judgment for plaintiff's disability. (4) How question of disability of claimant in probate court must be raised. (5) When foreign executor may maintain appeal from probate court, his prior disability being removed after the appeal. (6) What probate court has jurisdiction of will. One suing as executor must allege testator's residence at death.

<i>Smith v. Wait, imp.</i>	512
----------------------------------	-----

FORECLOSURE OF MORTGAGE. Adjustment of equities; holder of second mortgage not including homestead, cannot have that first sold under prior mortgage.

COSTS ON APPEAL.

<i>Sobey and others v. Thomas and another.</i>	317
--	-----

EVIDENCE. (1) Rule as to positive and negative evidence, when inapplicable.

MINING LEASES. (2, 3) Lease of exclusive right to work a certain range, construed. (4) Mining statutes construed, and held inapplicable where rights are defined by contract.

VOL. XXXIX. — 2

<i>St. Joseph Fire & Marine Insurance Company, Walters v.</i>	489
<i>Stahl v. O'Malley and others</i>	328
TOWN TREASURER. (1) Bound to execute warrant as received; can not correct errors. (2) When liable on his bond.	
PRACTICE. (3) Cause remanded for new trial when record does not show amount for which judgment should go.	
<i>State, Carpenter v.</i>	271
<i>State, Hall v.</i>	79
<i>State ex rel. Posey v. Supervisors of Crawford County</i> , 596	
CONSTRUCTION OF OFFICIAL RECORDS. (1) General rule of construction. Presumption as to records, where authority appears. (2) Effect of resolution that a certain order be entered on the journal. (3) Record as to presence and votes of members, construed.	
<i>Steinfort, Menk v.</i>	370
<i>Stiles, Siegbert and others v.</i>	533
<i>Stowell and others v. Eldred</i> ,.....	614
CONTACTS: EVIDENCE: PRINCIPAL AND AGENT. FORFEITURE: SPECIFIC PERFORMANCE: PLEADING: VARIANCE. (1, 2) Contract under seal by agent in his own name: General rule and exceptions. (3) Parol evidence that contract was made for benefit of third person. (4) Contract by A. for assignment to him of judgment against B.: Default before assignment, after payments with B.'s property: Rights of A.: Rights of B. in action against him on the judgment.	
PLEADING: VARIANCE: EQUITABLE COUNTERCLAIM. (5) When averments in answer will be treated as counterclaim. (6) Allegation of legal defense, with evidence of equitable counterclaim. (7, 8) Action on judgment: equitable counterclaim on the ground that judgment plaintiff, called as a witness for defendant, testified falsely as to facts within his knowledge.	
PRACTICE: AMENDMENT. (9) Amendment of complaint after reversal of judgment.	
<i>Supervisors of Columbia County, Baker v.</i>	444
<i>Supervisors of Crawford County, State ex rel. Posey v.</i>	596
<i>Supervisors of Omro v. Kaime and others</i>	468
TOWN TREASURER: BOND: SURETY. (1) Failure to approve bond does not relieve treasurer or sureties. (2) Liability of surety in case of annual office. (3) Duty of town supervisors in appointing	

treasurer on vacancy. (4) When treasurer and sureties liable after expiration of original term. (5) Liability for loss through failure of bank.

Swearingen v. Robertson..... 462

Statute of limitations.

Sydnor, Phoenix Lead Mining & Smelting Company v. 600

Tebel, Grootemaat v...... 576

Thomas v. Jones..... 124

BANKRUPTCY: Discharge in, cannot be impeached in a state court.

Thomas and another, Sobey and others v...... 317

Town of Baraboo, Matthews v...... 674

Traphagen and another, imp., Berrinkott v...... 219

Trask, Northrup v...... 515

Trempealeau County Farmers' Mutual Fire Insurance

Company, Van Slyke v...... 390

Tyler v. Burrington, Adm's...... 376

CLAIM OF WAGES by one received into defendant's family in infancy.

(1) Contract to pay wages not necessarily implied; may be implied from circumstances. (2) If received as a child, must show express contract. (3) Burden of proof. (4) Express contract defined. (5) Importance of distinction between circumstances from which contract implied, and circumstantial evidence of express contract.

Union Lumbering Company, Sellers v...... 525

Urquhart, Winslow and others v...... 260

*Van Slyke v. Trempealeau County Farmers' Mutual
Fire Insurance Company*..... 390

CONSTITUTIONAL LAW: TRIAL BY NON JUDGE. (1) Limitation of legislative power as to conferring judicial jurisdiction. (2) Act permitting trial by a member of the bar of this court in certain cases, void. (3) Presumption from record in such a case. (4) Judgments of judges *de facto*, distinguished. (5) Reversal of judgment for mistrial.

CHANGE OF VENUE. (6) How question of judge's prejudice to be raised.

Vaughn and others, Pike v...... 499

<i>Wait, imp., Smith v.</i>	512
<i>Walters v. The St. Joseph Fire & Marine Insurance Company</i>	489

FIRE INSURANCE. Cancellation of policy. Estoppel.

<i>Watson v. Wilcox, imp.</i>	643
-------------------------------------	-----

NOTICE OF LIS PENDENS. (1, 2) When notice not vitiated by needless and erroneous additions.

SUBROGATION. (3) Who entitled to be subrogated to rights of mortgagee.

<i>Wiesner v. Zawn.</i>	188
-------------------------------	-----

DEED: ESTOPPEL. (1) Deed construed as purporting to convey the whole land, and giving color of title thereto. (2) Grantor's subsequent title enures to grantee by estoppel.

STATUTE OF DESCENTS. (3, 4) On death of minor child, surviving brothers and sisters take his share of his deceased parent's estate as heirs of the parent. (5, 6) Rule explained and limited.

STATUTE OF LIMITATIONS. (7, 8) Disability of coverture suspended the running of the statute before the act of 1872.

<i>Wilcox, imp., Watson v.</i>	643
--------------------------------------	-----

<i>Williams, Jones and another, Adm'rs, v.</i>	300
--	-----

<i>Williams, Perry v.</i>	339
---------------------------------	-----

<i>Wilson v. The City of Mineral Point and another.</i>	160
--	-----

INJUNCTION: TRESPASS: DESTRUCTION OF FRUIT AND ORNAMENTAL TREES. (1) When injury irreparable, and when enjoined. (2) Threatened destruction of fruit and ornamental trees by city and its street commissioner, held ground for injunction against both. (3) Right to damages not decided.

<i>Winslow and others v. Urquhart.</i>	260
--	-----

STATUTORY LIEN: LABOR UPON LOGS. (1) Statutes valid. General owner not necessary party. (2) Rights of general owner; may replevy; not estopped by lien judgment. (3) When justice's judgment for a lien presumed valid. (4) One who cooks food for the loggers, etc., entitled to lien. (5, 6) Form of affidavit for attachment in such cases.

PRACTICE. (7) New trial in replevin, after judgment reversed

<i>Worden, Brown v.</i>	432
-------------------------------	-----

Yates v. Shepardson. (Cross Appeals),..... 173

PRACTICE. (1, 4) Trial by referee. Exceptions to his findings. (2) *Res adjudicata*. (3) Waiver of objections to defect of parties and misjoinder of causes.

EVIDENCE. (5) Note and receipt on settlement construed; their effect as evidence. (6) Check not evidence of loan from drawer to payee.

ACCOUNT: INTEREST: OFFSET. (7) Interest on account. Offsetting account against note.

Zaun, Wiesner v..... 188

DEATH OF HENRY S. BAIRD.

At a session of the court held on Tuesday, the 15th day of February, 1876, present EDWARD G. RYAN, Chief Justice, and ORSAMUS COLE and WILLIAM P. LYON, Associate Justices, GEORGE B. SMITH, Esq., addressed the court as follows :

May it please the Court: To me has been assigned the mournful duty of announcing the death of the Hon. HENRY S. BAIRD, and of presenting to this court the resolutions of the bar of Brown county on his decease, with the request that they may be entered upon the records of this court. Mr. BAIRD has been so long engaged in the practice of his profession in Wisconsin, and so intimately and actively connected with its history from its very commencement, that his life and character as a lawyer and a citizen have always been familiar, not only to the bar but to the people of the state.

About ten years ago, Mr. BAIRD retired from the practice of his profession, and from all participation in public affairs, full of years and full of honors; but up to that time, and for a period of now full fifty years, he was a resident of Green Bay, and was all the time prominently identified with our profession, as one of its most able, faithful, upright and successful lawyers. During most of that time, he was also foremost among the most able in forming and shaping the government of our territory and state. In fact, for a period of at least forty years he was so closely connected with public affairs that a full history of his life would be almost a complete history of Wisconsin.

It would be improper, therefore, as well as impossible, for me to do more on this occasion than to present a very brief outline of the life, character and services of Mr. BAIRD.

The people of the state cannot, however, afford to let the history of so important and so worthy a man — one who had so much to do with the early history and with the whole history of our state — pass into obscurity. So we may confidently hope that by and by some one, fully competent to do the subject justice, will write and publish his true life.

The men identified with our earliest history, one by one, are passing away; and among them all, none deserves more our gratitude and respect than HENRY S. BAIRD.

Mr. BAIRD died at his house in Green Bay, April 30, 1875. I find in the

Death of Henry S. Baird.

Green Bay *Advocate*, under date of May 6, 1875, a brief sketch of his life, character and services, which is so admirable in all respects, and so exactly appropriate to this occasion, that I have thought best to incorporate it here. This, together with the resolutions heretofore spoken of as having been adopted by the Brown county bar, if they shall be placed upon the records of this court, will remain forever as evidences of our affectionate esteem for this distinguished brother:

"MR. BAIRD was born in Dublin, Ireland, in 1800, and was seventy-four years and nine months old. At an early age he came to this country with his father, and for a time settled in Philadelphia. He afterward went to Pittsburgh, Pennsylvania, where he studied law, and at about the time he attained his majority went to Mackinac and entered into practice—adding to his income, as many young lawyers still do, by teaching school. In July, 1824, when the Green Bay settlement was commencing, he came here on a tour of inspection, and decided to locate here. He returned to Mackinac, was married to the present Mrs. BAIRD, then a girl of scarcely fifteen, who had been one of his pupils, came back in September of that year, and located where the Green Bay settlement then existed, about two and a half miles south of here. A United States district court, with Judge JAMES D. DOTY presiding, had been established here the previous year, with jurisdiction in the counties of Brown, Mackinac and Crawford; and in a paper on early times in Wisconsin, by Hon. JAMES H. LOCKWOOD, we find this sentence: 'I found no attorneys in Brown. There were several in Mackinac—among them HENRY S. BAIRD, then quite a young man, just commencing practice, and whom I considered the best lawyer among us.' He was admitted to the bar here in that year, and at once entered upon a successful practice, which was actively continued until some ten years ago, when he withdrew from court work, only continuing to a limited extent the management of private affairs and estates. As a lawyer, he was accurate and painstaking, throwing himself with all his force into every case he undertook, and giving his clients the utmost services in his power to render. He had the reputation, probably won through these qualifications, of being one of the most successful lawyers in the state. The legal profession of those days and for a long time afterward involved long journeys by primitive modes of conveyance—to Mackinac and Detroit by sail craft, to Prairie du Chien by bark canoes with Indian *voyageurs*, to Milwaukee on horseback, and so on. In 1835, he removed from up the river to what was then called Navarino, now the Third Ward of Green Bay, and in 1836, built the house where he has ever since resided.

"Within the space which we can devote to the subject, we can only give a glance at his public record. In his own home in Green Bay, he has several times been called upon to preside over its councils, having been president of the village board in 1853, and mayor of the city in 1861 and 1862. He was president of the first legislative council of the territory of Wisconsin, which

Death of Henry S. Baird.

was held at Belmont, Iowa county, in 1836. Upon the organization of the territory, he was appointed attorney general by Gov. DODGE. And he was a member of the first convention to form a state constitution, which met at Madison in 1846. As one of his local services here, also, he was one of the three commissioners — A. J. IRWIN and EBENEZER CHILDS being the others — to open the road on the east side of Fox river, from Green Bay to Kaukauna. He was secretary for Gov. DODGE at the great treaty at Cedar Rapids in 1836, wherein the Menominees ceded some 4,000,000 acres of this country to the government. In our home matters, societies, lecture associations, etc., his name has always been prominent; and, while in active life, no public event scarcely could occur without his being more or less prominently connected with it.

"In the gratuitous services which followed upon the great fire which swept over this region in 1871, destroying so much life and property, Mr. BAIRD was among those prominently called upon to aid in alleviating the distress and in distributing the vast amounts of relief sent forward from all parts of the country. That service perhaps exemplified some phases of his character better than any other. It involved dealing with a great amount of deception and rascality, as well as with honest merit and actual destitution. Nothing could exceed his indignation, when he thought he had detected an attempt at swindling upon that charity; and when he came upon a really meritorious case, his broad sympathies outpoured to the very limit in their relief.

"In the early history of the state, Mr. BAIRD will always present a prominent point. He has been a vice-president of the State Historical Society, we think, since its organization; and his portrait hangs to-day among the others of public men on the walls of the society's rooms.

"In politics, Mr. BAIRD was conservative, adhering to the Whig party so long as it existed, and then joining, though rather reluctantly, the Republican organization which followed it. The erection of the Republican party in Wisconsin found the Whig party in full organization, with Mr. BAIRD as its candidate for governor. The transfer carried enough strength to defeat him, and to elect his opponent instead; but Mr. B. was the last to leave the old Whig ship, and the last to hail its vanishing flag as it sank beneath the political sea.

"In Masonry, Mr. BAIRD was a distinguished member, having been Grand Master of the Grand Lodge of the state, in 1857 and 1858, and Grand High Priest of the Grand Chapter in 1855."

Little more may be said, and we will only add another paragraph from the same paper, showing in what esteem Mr. BAIRD was held by his neighbors in his social relations with them: "We know of no one who will be missed more from our midst, and it will be long before our people shall be accustomed to not seeing his familiar form in our streets, receiving his pleasant greeting, and still more, meeting him as the genial and hospitable host in his always pleasant home. It was under that catholic roof where were banished politics

Death of Henry S. Baird.

and all differences; and annually upon every New Year's day he made a reunion where all should partake of good cheer, without social, or party, or religious boundaries." Thus we see that our good brother was respected and beloved in every relation of life, professional, political and social; he was a good lawyer; a useful and distinguished citizen; and, above all, he was an honest man.

I now move that the resolutions which I will read, shall be placed upon the records of the court:

RESOLUTIONS passed by the Bar of Brown County, respecting the death of
HON. HENRY S. BAIRD.

An allwise Providence has removed from our midst our esteemed friend and brother, the Hon. HENRY S. BAIRD, president and pioneer member of this bar, and one whose life has been prominently identified with the history of Wisconsin from its territorial organization to this present time.

His able and faithful public services in all the important trusts to which he was called, the ability and integrity which he manifested throughout his professional career, and the uniform kindness and courtesy which characterized him in all the relations of life, endeared him to a large circle of friends, to the profession and to the community, by all of whom he is justly held in grateful remembrance. His many excellent traits of character, presented through a long, useful and honorable life, rendered him one of the most distinguished and respected citizens of the state. The members of this bar, in common with the whole community, deeply deplore his loss, and join, with profound respect, regret and reverence, in paying their last tribute to his memory; therefore,

Resolved, That in the death of our brother, Hon. HENRY S. BAIRD, the state has been deprived of one its most useful and honored citizens, the profession of one of its oldest and most distinguished members, and society of one of its brightest ornaments.

Resolved, That as a testimonial of our high appreciation of his life and character, and of his many virtues as a lawyer, patriot, citizen and friend, these resolutions be presented to the county and circuit courts for Brown county, with the request that they be entered upon their records; also, that a copy be transmitted to the Hon. E. G. RYAN, the chief justice of the supreme court, with a request that the same be entered upon its records.

Resolved, That we tender to the friends and family of the deceased, our sincere condolence and sympathy in their great affliction; and that the chairman of this meeting transmit to the widow of the deceased a copy of these proceedings.

Resolved, That in memory of our deceased brother, we will attend his funeral as a body, and wear the usual badge of mourning for thirty days.

Death of Henry S. Baird.

B. J. STEVENS, Esq., said:

May it please the Court: The business interests of a million and a quarter of people are waiting for the action of the court. It is not far from the commencement of a term, and it will require unremitting labor to dispose of the crowded calendar of causes before the coming on of another term. Yet it is fitting that the supreme court of Wisconsin should pause in the midst of its labors, to take note of the death of the oldest, professionally, of the lawyers of the state, and the first to practice at the bar, although the second to be admitted, in the district which is now the state of Wisconsin.

It was my fortune to have an acquaintance and friendship with the late HENRY S. BAIRD. I knew him during many of the later years of his life. While it is probable that my tribute of respect will add little to his fame, I owe it to myself that the opportunity should not pass untaken, for expressing before the supreme court my appreciation of the great loss sustained in his death, and of the high ensample of his life.

The chief facts in the history of the life of Mr. BAIRD, with an eloquent tribute of respect to his memory, have been given in the hearing of the court. They need not be repeated in detail.

Born in Ireland, passing boyhood and youth in the states of Pennsylvania and Ohio, he came into what was then within the territory of Michigan and is now the state of Wisconsin, in early manhood, at the age of twenty-four years. There he resided for more than half a century.

To appreciate the man, it is necessary to consider, to some extent, the condition of the country and character of the times in which he lived.

To few has it been given to witness in the same length of time so great and so many material and social changes. When he came into what is now Wisconsin, he found, at the mouth of the Fox river, a small settlement consisting, all told, of about sixty rude dwellings, scattered along for five miles on both sides of the river, from its mouth to the falls at De Pere. To this size only had grown a settlement which was established in the year 1745, nearly eighty years prior thereto. The settlers were largely of French origin, with only six or eight resident American families. The farms occupied by this primitive people consisted of long strips of land, fronting on the river, of from two to seven rods in width, and extending back from one to three miles. The location of the dwellings upon the water's edge enabled the occupants to combine against Indian attack, and, in time of peace, to engage, upon nearly equal terms, in the business of fur trading, which was almost their only business. There were then no other white people within the limits of Wisconsin, excepting a like settlement of nearly equal size at Prairie du Chien, and one or two families on the Fox river at Grand Kaukauna. With these exceptions, the entire territory was an unbroken wilderness. To no part of it had the Indian title been extinguished. The country was under military rule.

Death of Henry S. Baird.

The mail was carried in the winter by soldiers from Green Bay to Detroit; two mails in six months. In the preceding year, the year 1823, the northwestern judicial district of Michigan territory was formed, comprising the counties of Mackinac, Brown and Crawford, which counties embraced a large part of the present state of Michigan, the whole of the states of Wisconsin and Iowa, and a part of the state of Minnesota. Over this district, JAMES DUANE DOTY was appointed judge, and in October, 1824, he opened at Green Bay the first term of court ever held within the present limits of Wisconsin. At this term of court, HENRY S. BAIRD was admitted to the bar, and was appointed the prosecuting attorney, *pro tem.*, and as such served during the term, in the trial of more than forty cases, such as they were. On the 23d day of the preceding August, and out of term, J. H. LOCKWOOD had been admitted to the bar by Judge DOTY. He had received from the government a commission as prosecuting attorney for the counties of Brown and Crawford. Although Mr. LOCKWOOD was the first to be admitted, Mr. BAIRD was the first to practice as an attorney within the present limits of the state. In the year 1825, on the business of his profession, and in company with Judge DOTY, Mr. BAIRD traveled in a bark canoe from Green Bay to Prairie du Chien, a distance of more than two hundred and fifty miles through an unbroken wilderness. On like business, in the year 1829, in company with MORGAN L. MARTIN, he made the same journey on horseback, it being the first party of white men, who, by that mode of travel, had accomplished the journey. And again, on like business, a year later, in 1830, accompanied by his wife and their two infant children, he made the journey in a bark canoe, occupying eight or nine days in going and about the same length of time in returning. From the time of Mr. BAIRD's coming into the country until 1836, twelve years thereafter, the development of the resources of the country was comparatively slow. The first frame house in Wisconsin was built in 1825. In 1827 the first printing was done, and the first steamboat appeared on Lake Michigan. In 1831, the first cession of lands to the United States was made by the Indians. In 1833, the first newspaper appeared. In 1834, the first mail was carried to Chicago, and the first survey of public lands near Green Bay took place; while in 1836, the remaining lands of the state were ceded by the Indians. From this time, the year 1836, on, the development of the resources of the country became so rapid that it was difficult to keep pace with and note the changes. Up to the time of his death, Mr. BAIRD had seen a change in the population of Wisconsin, from a few hundred in 1824, to over three thousand in 1830, when the first census was taken, and to a million and a quarter in the year 1875: a change in the number of newspapers, from one in 1833, to two hundred in 1875; in the number of schools, from one or two up to five thousand, with pupils numbering nearly three hundred and fifty thousand; in churches, from one or two to nearly fifteen hundred; in railroads, from not a mile to nearly twenty-five hundred miles; in the yearly value of manufactures, from little or

Death of Henry S. Baird.

nothing in 1824, to more than seventy-seven millions of dollars in 1870; and in the acreage and value of its farms, from a few acres valued at a few dollars in 1824, to nearly twelve millions of acres valued at over three hundred millions of dollars in 1870, and having an annual yield, in the item of wheat alone, exceeding twenty-four millions of bushels.

It was in the midst of changes of such extraordinary character that Mr. BAIRD performed the labor of his life. He performed it well. He had much to do in moulding the institutions of the state. He was a member of the territorial council, and of the first constitutional convention. He was called upon to assist at the making of treaties with the Indians (by whom he was regarded as a steadfast friend), and to perform many and varied public services. In all the enterprises which tended to develop the resources and promote the prosperity of the state, he was an active and zealous participant.

As a lawyer, the first to practice here, he had to do with the settlement of the forms of practice, and by his conduct gave character to the profession. He continued in active practice from the time of his admission to the bar until his retirement, about the year 1860; and at the time of his death was the president of the Bar Association of the county of Brown (a county out of which had been carved nearly thirty counties of size equal with it then, and having still a population thirty times as great as its population before it was shorn of its area.) His position at the bar was conspicuous throughout. He was remarkably accurate, painstaking and attentive to detail. He was chosen to fill places of trust and confidence, was the administrator of estates, and the agent of the Astors (than whom, in the selection of those who should serve them, there were none who were more discriminating as to integrity, or more exacting as to the performance of duty). And from the performance of the delicate and exact duties growing out of such trusts, extending over half a century, he comes without stain upon him. There is not a whisper of abuse of trust, or any neglect of duty, great or small.

As a member of society, he was respected and loved by all. He was singularly fortunate in his domestic relations. At Mackinac, just before coming into the country, he married a young girl, of the age at which, ordinarily, girls are at school, who (in his companionship) developed into a woman of ripe culture and the highest accomplishment. Although the home of Mr. and Mrs. BAIRD was made in the midst of a community living in rude dwellings, encountering the hardships incident to life in a wilderness, and apparently possessing few of the elements which constitute refined society, yet, throughout the many changes that followed, their home was the center of a domestic and social circle in which none of the culture and refinement of the highest civilized life was wanting. After years of married life had passed away, and their friends and neighbors were gathered together to celebrate the golden or fiftieth anniversary of their marriage, it fell to the lot of a distinguished senator of the United States, who himself for thirty years had

Death of Henry S. Baird.

been their neighbor and friend, to give expression to the sentiments of those before whom Mr. and Mrs. BAIRD had passed their lives. With not less of truth than beauty, he said:

"I call upon these, your neighbors, to bear witness that we stand in the presence of a couple who came here into a remote wilderness fifty years ago; who brought the best style of Christian civilization with them; who have cherished it ever since, until now, when the tide of metropolitan taste and metropolitan culture breaks at their feet, it brings no sentiment of kindness, no rule of courtesy, no flower of good breeding, which is not domestic here in this household."

In the *Weekly Globe*, a news sheet published by the youth at Green Bay, in an issue which appeared soon after the death of Mr. Baird, I also find words expressive of the love and respect in which he was held by those who knew him best. They are attributed to one who was born and grew to manhood in the shadow of Mr. BAIRD. The keen discernment of youth gives them value. Says the writer:

"HENRY S. BAIRD is dead, the true old gentleman, the just and upright man, the good and wise counselor, the ceaseless and untiring benefactor, the hospitable and beloved neighbor, the old and honored citizen, the generous and faithful friend. * * We have lost our principal citizen. He had not lived as many years as some; he had not attained as high offices as some; he had not accumulated as much wealth as some; but the distinction of being our first citizen was tacitly and instinctively conceded to him by all."

Mr. BAIRD adapted himself to the times in which he lived. He did that which was next to his hand, changing the direction of his effort with the varying demand which the rapidly shifting times presented. It followed that his attainments were varied and his discipline many sided. A concentration of effort in one direction might have given to him greater superiority, but also in a vastly greater degree it would have lessened the measure of his usefulness. A more critical legislator would have had less influence with the men who moulded the institutions of the state. A more nearly accurate lawyer would not have attained equal success in practical affairs. Had he been less demonstrative in his kindness, he would have been less potent for good in the establishment of society.

HENRY S. BAIRD has passed from among us; but the high ensample of his life, in its relations to the state, the legal profession and society, still remains. May we not hope, that an honest, faithful, capable life, considered even in its temporal relations, is not lived in vain; that its influence is not as transient and evanescent as mere physical vitality, but that the progress of mankind in all that is virtuous and ennobling is accelerated by it; that although the life of one man may be a small factor in the aggregate lives of the race, yet, if well spent, its after influence is perceptible and continues to endure for good; and may we not truthfully say, the world is better that such a man has lived?

Death of Henry S. Baird.

T. R. HUDD, Esq., of Green Bay, said:

If your Honors please: As a member of the bar of the tenth judicial circuit, of which the deceased was the president at the time of his death, and as a citizen of Green Bay, where he resided for so many years, I may be permitted to add a word to the tribute already so well and perhaps fully rendered to the memory of the lamented subject of the eulogies of to-day. His fame as a lawyer has already been so well described, with such fitting language, by the distinguished gentlemen who have just addressed the court, that were I able to follow them in that direction, it would only be a repetition of the thoughts already so eloquently and generously presented.

As a citizen of Wisconsin, HENRY S. BAIRD's best monument will ever be the advance and progress of his adopted state from the mere handful he found here, as he came in the van of the pioneers, while our state was the undeveloped wilds of a part of the great Northwest Territory. He was called, ripe in years, but richer still in the respect and love of all classes in the state of Wisconsin, to enter into the rest which his labors and years had prepared his friends to expect. Our loss, indeed, his absent form, his kind, familiar face gone! But the spirit, the indomitable will, that helped to carve empire from the wilderness, still lives; and the fame, progress and manifest destiny of Wisconsin and the west still endure, in some part the result of the labor of his hands and brain. Wisconsin's pioneer lawyer shall not want a monument. The marble of the churchyard is cold, indeed, and soulless; but a grateful people's remembrance of the noble, good and true men who were the fathers of the state, shall make the record as lasting as the state itself; "for their works do follow them."

Of HENRY S. BAIRD as a neighbor, I may speak; but only to repeat the whole voice of that city in which he spent a half century of his life; where, more than fifty years ago, he brought his fair bride, a noble woman, still living; where, only a little year ago, was celebrated their golden wedding, that brought a whole city to their doors with the only gifts he would receive—congratulations and the hand of friendship; for in all those happy years he had learned,

"By daily kindnesses, the truth
And wisdom of the Scottish rhyme—
To make a happy fireside clime
For children and for wife,
Is the true pathos and sublime,
And green and gold of life."

HENRY S. BAIRD died literally beloved by every living creature in the city of Green Bay. In that death the poor lost their best friend, the rich their truest example. As one of the thousands who have sat at his hospitable

Death of Henry S. Baird.

board, and listened to his words of wisdom and experience, I have a right to say, and to say it on behalf of all his more immediate neighbors of Green Bay, that they loved him living and mourn him dead, as the kindest, truest gentleman of his age, one of the few gentlemen of the old school; of whom it may be again said: "None knew him but to love him; none named him but to praise."

On behalf of the court, Mr. Chief Justice RYAN responded as follows:

At the time of his death, Mr. BAIRD was truly the father of the Wisconsin bar, and worthy to be so. And it is only decent that we should pause a little in the business of life to notice a death which leaves so large a vacancy, personal and professional.

So much has been said, and well said, at the bar, of the remarkable career of Mr. BAIRD, that there is nothing left for us to add to it; little left for us to say, beyond our cordial assent to the witness of praise borne here to-day to his memory. We all knew him well. And we all attest that, highly as his life and character have been lauded at the bar, all that has been said of him is quite within the truth.

I first met Mr. BAIRD in 1842, in Racine, where he and I were engaged together in the defense of an officer of the army tried by court martial. Thenceforth we met often; sitting together for over two months in the first constitutional convention, of which he was a conspicuous member, distinguished by the fairness of his views and the soundness of his judgment. And I think I may say that I knew him well.

In a long career, I certainly have met men of greater apparent ability than Mr. BAIRD, but I doubt if I ever met one of keener perception of truth and greater fairness of judgment. These made him what he was, a singularly safe adviser, trusty agent, capable man of business, and an invaluable friend. They are qualities importing intellect of no low order, but they were more owing in him to the sound and kindly integrity of his heart. For as far as human frailty will admit, Mr. BAIRD was essentially a good man.

I recall, as I write, but two men whom it has been my fate to know well, in whom goodness, of itself, seemed to me to be power. One of these was a person whom I never recall without emotion, the saintly Bishop KEMPER; the other was Mr. BAIRD. Both had intellect for all their duties in life; but their power over men rested in the goodness of their nature, far more than in their force of character. Both proved what men rarely, women more frequently prove, that goodness may be a positive power in life. Mr. BAIRD's profession and his ability in it tended to make this the more marked in him. He was an intelligent and able lawyer, and would have ranked so at any bar, at any time. And he was zealous and eager, as becomes a good lawyer. But the simple

Death of Henry S. Baird.

sincerity and benignity of his character were never warped by selfish instincts or obscured by professional ardor. Truth spoke always from his open, manly, beaming face. The guileless innocence of childhood was singularly combined in him with shrewd knowledge of the world: as it is written, in malice a child, in understanding a man. It hardly seems exaggeration to say of him that he was wise as serpents, harmless as doves.

This child-like simplicity and innocence of nature, this benignity of manhood, were, I think, the master-key to Mr. BAIRD's whole life, public and private. As a politician, and he was an influential one, they made him moderate, and true to his principles through all the changes, excesses and exactions of party. As a lawyer, they made his retainers always subordinate to his sense of justice, and kept him free from entanglement in monopolies and schemes of public oppression or imposition. As a citizen, they made him what all who surrounded him in life gladly knew him to be, a genial and high toned gentleman; a generous, guileless man, free from all circuitry and deceit; gentle hearted and large minded, sagacious, moderate, judicious, faithful, true and just; whose charity never wearied and never slept; who held his own and his friend's honor above all the blandishments of passion and all the temptations of ambition and wealth; and who came as near as our nature can come, loving his neighbor as himself. What they made him in the sacred privacy of his refined family and home, who may venture to tell? We dare only say that they made his pleasant house a central example of the cordial hospitality which has always distinguished the quaint old borough in which he passed his mature life.

The death of such a man, at any age, brings true and lasting sorrow. But this is sorrow rather for those who stay behind than for him who has gone on before. What sting has death for such a man as Mr. BAIRD, in the fullness of years and of honor, ripe for better life? As has been said, he saw Wisconsin grow from a wilderness to the state it is. But Wisconsin too saw him grow from the sapling to the tree; saw him accomplish great good, public and private, in his day; saw him with affectionate reverence linger a little after the active labor of his life was done; saw him ripen in all excellence for the change which, to such as he, is not so much the grave of this world as the womb of the world to come; saw him laid, a Christian gentleman without spot or blemish, in the earth which will surely give up its dead; and honors him in death as it did in life. Such death following such life is repose too holy for sorrow.

It would have been a sad solecism to pass Mr. BAIRD's death in silence here. We thank the gentlemen of the bar who have so happily brought the matter before the court. And the feeling with which we order these proceedings to be entered of record, is no ordinary tribute to departed professional worth.

CASES DETERMINED

AT THE

August Term, 1875.

In re KINDLING. (Habeas Corpus.)

CONSTITUTIONAL LAW: ARREST: BAIL: DETENTION AFTER JUDGMENT.

(1, 2) *Judges of courts of record may make chamber orders to hold to bail. (3) Upon affidavit showing the tort for which action is brought. (4, 5) Detention of defendant on such order after judgment against him.*

1. The judges of the courts of record of this state take, under the constitution creating their offices, the powers of judges of such courts at the common law, including the powers commonly possessed by them *at chambers* at the time of the adoption of the constitution.
2. Such judges have power, under the constitution, to make orders at chambers to hold to bail, in proper cases, that being the established practice when the constitution was adopted.
3. In an action in the county court of Milwaukee county (which is a court of record) for a tort, the defendant was arrested upon an order of the judge of said court, made at chambers, upon an affidavit showing the tort. *Held*, that the arrest was lawful.
4. When a defendant lawfully arrested on mesne process fails to give bail, or is surrendered by his bail, before judgment, his liability to detention on such process does not expire on the recovery of judgment against him in the action; but, unless otherwise discharged by the court, his detention must abide a *capias ad satisfaciendum*.
5. What the prisoner's remedy would be, if, after judgment, the plaintiff should improperly and oppressively delay taking him in execution, is a question not raised by the writ of *habeas corpus* in this case.

In re Kindling.

APPEAL from the County Court of *Milwaukee* County.*

An action was commenced in said court in December, 1874, by one Jung, of Berlin, Germany, against *Herman Kindling*, to recover the value of personal property alleged to have been stolen from Jung by *Kindling*; and judgment for \$1,168.95 was recovered against the defendant in the action July 29, 1875, and docketed two days thereafter. *Kindling* had been arrested upon an order made by the county judge at chambers, upon proper affidavits, and, in default of bail, confined in the county jail of Milwaukee county, and was so confined when and after the judgment was rendered. A *fi. fa.* was issued on the judgment August 4, 1875. On the same day, E. M. Hunter, Esq., a court commissioner, after a hearing upon an order to show cause, made the previous day on *Kindling's* application, made an order in the action for the discharge of the prisoner. This order was served on the sheriff August 5. Afterwards on that day (but before the sheriff had in fact released the prisoner), Jared Thompson Jr., Esq., a court commissioner, made an order in the same action, directing the sheriff to arrest *Kindling* and bring him before said commissioner. This order was based upon an affidavit of one of Jung's attorneys, which, after stating the recovery and docketing of said judgment, and the facts that *Kindling* was a resident of Milwaukee county, and that an execution against his property had been issued in said county and was in the hands of the sheriff, further states "that said judgment was recovered for the money value of personal property, consisting partly of jewelry and mostly of negotiable securities, stolen by said defendant from said plaintiff in Berlin, Germany, on or about the first day of September last, and that

* The importance of the questions raised upon the original return of the sheriff to the writ of *habeas corpus* in this case seems to justify a full report of the facts and arguments bearing upon them, although many of those questions were left undetermined by the judgment, in consequence of the supplemental return. — RAR.

In re Kindling.

said defendant, immediately after said date, came to this city of Milwaukee," and that affiant is informed and believes "that said defendant brought with him to this city of Milwaukee a large amount of the proceeds of the property so stolen by him, which he sold, and that he now has a large amount of property under his control, but this deponent says that said defendant refuses unjustly to apply any of his property towards the satisfaction of said judgment, which is wholly unpaid." The affidavit then states that defendant had been arrested by order of the county judge, and required to give bail in the sum of \$10,000, and had neither given bail nor deposited the amount, and that nevertheless Commissioner Hunter had made an order for his release from such arrest, and adds, "that during his imprisonment on said order of arrest, said defendant once before escaped into the state of Iowa, and there concealed himself under a false name, and the wife of said defendant, as deponent is informed, has already left this state, and deponent is afraid and verily believes that said defendant will be released from imprisonment under said order of Court Commissioner Hunter, and he has reasons to believe and does believe that said defendant will at once leave the state on being so released." Mr. Thompson's order recited as a fact (among others), made to appear to his satisfaction, that there was danger of the judgment debtor leaving the state, and reason to believe that he had property which he unjustly refused to apply to the payment of the judgment. *Kindling* being still in jail when this order was served, the sheriff, in obedience thereto, arrested him and brought him before Mr. Thompson on the same day. The prisoner moved for his discharge upon the following grounds: 1. That the affidavit on which the said commissioner's order of arrest was based, did not state facts sufficient to warrant the order. 2. That the cause of action in favor of Jung against the prisoner was merged in the judgment rendered, and was "thereby reduced to a simple indebtedness, upon which, in the absence of any

In re Kindling.

fraud committed subsequent to the judgment," *Kindling* could not be arrested upon a warrant under the statute regulating proceedings supplementary to execution. 3. That said statute is in conflict with the constitution of this state, and void. 4. That, inasmuch as defendant was arrested and held to bail prior to judgment in said cause, and the plaintiff therein had elected to issue execution, not against his body, but against his property, and after such last named execution was issued, the prisoner was discharged from custody by order made in said cause, the plaintiff could not now resume proceedings against the body. The motion for discharge was denied. The prisoner then objected to being examined under oath as to his property, on the ground that the affidavit on which Commissioner Thompson's order of arrest was made, showed that the cause was prosecuted to recover for property alleged to have been stolen by the prisoner in some foreign country, in which sec. 89, ch. 134 of the revised statutes of this state, would not be a protection against the use of this examination as evidence against him in a criminal action, and therefore he could not be compelled to submit to such examination without a violation of sec. 8, art. I of the constitution of this state. The objection was overruled, and the oath usual in supplemental proceedings administered.

The prisoner having testified that he left Berlin, in Germany, about the first of September, 1874, and arrived at Milwaukee in December following, was asked: "What did you do with the eight Austrian bonds, of one thousand guilders each, which you took from the plaintiff?" He refused to answer this question, on the ground that the answer might tend to convict him of crime in this state or elsewhere; and the commissioner adjudged him to be in contempt for such refusal, and delivered to the sheriff a warrant for his commitment for such contempt. This warrant recites, *inter alia*, that said *Kindling* had been arrested upon said commissioner's previous warrant, and commands the sheriff to commit him to the county jail, and

In re Kindling.

there keep him "until he shall stand ready to make full and proper answer to said question, or until he be discharged by due course of law."

The prisoner thereupon applied to this court for a writ of *habeas corpus cum causa*. The petition stated that his confinement, after the delivery to the sheriff of the warrant last described was "under and by virtue of said warrant, and without other authority or pretense of right."

The writ of *habeas corpus* having issued, the sheriff made return thereto on the 17th of August, 1875, in which he stated, *inter alia*, that the order for the discharge of *Kindling*, made by Commissioner Hunter on the 4th of August, was served before Commissioner Thompson's *first* warrant of the same date for the arrest of the prisoner was issued; but that, being advised that said order of discharge was void in law, he (the sheriff) still held said *Kindling* by virtue of the original order for his arrest. The substance of the other facts stated in the return has already been given.

Matt. H. Carpenter, for the petitioner, contended, that by the terms of the statute which is relied upon as authorizing supplementary proceedings against a judgment debtor (Tay. Stats., 1565, § 100),* such debtor can be arrested upon the

*The statute contains the following provisions:

"§ 100. * * After the issuing of an execution against property, and upon proof by affidavit of a party or otherwise, to the satisfaction of the court or a judge thereof, a county judge, or a court commissioner, that any judgment debtor residing in the county where such judge or officer resides, has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge, county judge or court commissioner, may by an order require the judgment debtor to appear, at a specified time and place, to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward satisfaction of the judgment as provided upon the return of an execution. On an examination under this section, either party may examine witnesses on his behalf, and the judgment debtor may be examined in the same manner as a witness. Instead of the order requiring the attendance of the judgment debtor, the judge or county judge or court commissioner may, upon proof by affidavit, or other-

In re Kindling.

court commissioner's warrant only upon *proof*, to the commissioner's satisfaction, first, that there is danger of the debtor leaving the state or concealing himself, and, secondly, that he has property *which he unjustly refuses* to apply to the judgment; that it is not enough to show that the judgment plaintiff or his attorney *believes* these things, but there must be evidence of *facts* satisfying, or tending to satisfy, the judicial mind of the commissioner; that the affidavit upon which Commissioner Thompson's warrant in this case was obtained, furnishes no proper proof either that plaintiff had property, or that he ever *refused* to apply it to the judgment, or that such refusal was *unjust*; that there can be no *refusal* to apply property in a particular manner until there has been a *demand* for such application, which is not here pretended; that every refusal, upon demand, to apply property to a particular judgment, is not necessarily *unjust*; that an affidavit under the statute should show possession of some particular property, describing it, and a request made upon and refused by the debtor to apply that particular property; and that the peti-

wise, to his satisfaction, that there is danger of the judgment debtor's leaving the state or concealing himself, and that there is reason to believe he has property which he unjustly refuses to apply to such judgment, issue a warrant requiring the sheriff of any county where such debtor may be, to arrest him and bring him before such judge, county judge or court commissioner.

"§ 101. Upon being brought before the judge or court commissioner he may be examined on oath, and if it then appears that there is danger of the debtor's leaving the state, and that he has property which he has unjustly refused to apply to such judgment, he may be ordered to enter into an undertaking, with one or more sureties, that he will from time to time attend before the judge or court commissioner as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the judge, or court commissioner, as for a contempt. No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution."

In re Kindling.

tioner could not be in contempt for refusing to answer questions put to him in an examination based on such *void* warrant. *Blair's Case*, 4 Wis., 522; *Remington's Case*, 7 id., 643; *Whitney v. Brunette*, 15 id., 61; *Miller v. Brinkerhoff*, 4 Denio, 119; *Den v. Turner*, 9 Wheat., 541; *Staples v. Fairchild*, 3 Coms., 46. 2. That the statute under which the proceedings were taken (Tay. Stats., 1565, §§ 100, 101) is void because in violation of sec. 16, art. I of the state constitution, which declares that "no person shall be imprisoned for debt arising out of or founded on a contract expressed or implied;" that every statute which would produce, though by indirection, a result forbidden by the constitution, is invalid (*Bronson v. Kinzie*, 1 How. (U. S.), 318; *The Passenger Cases*, 7 id., 283); that as to proceedings in judgments upon actions founded on contract, the repugnancy of the statute to the constitution is clear (*Bank v. Pugsley*, 47 N. Y., 638, and compare the remark of COLE, J. in *Remington's Case*, 7 Wis., 655, and the reasoning of the court in *Blair's Case*, 4 id., 522); and that the proceedings cannot be upheld in this case on the ground that the judgment is in an action *ex delicto*, for two reasons: (1) Because by the law of this state a debtor, in cases *ex delicto*, may be arrested and held to bail before judgment, and taken in execution *against the body* after judgment, and may be relieved after ten days' imprisonment, in the manner pointed out by the statute; but by issuing execution against the debtor's property, and taking these proceedings in aid of such an execution, the judgment plaintiff elected not to proceed against the debtor as a *tortfeasor*; and (2) Because this is not a case where one part of a statute is constitutional, while other *distinct provisions* are unconstitutional, but one in which the legislative provision is *indivisible*, and, being unconstitutional in its scope, must be regarded as wholly void, "although there may be a class of cases to which it might properly apply." SELDEN J., in *Wynehamer v. The People*, 13 N. Y., 442; *Slau-*

In re Kindling.

son v. Racine, 13 Wis., 398; *State v. Dousman*, 23 id., 541; *Warren v. Charlestown*, 2 Gray, 84. 3. That, if the statute were valid and the proceedings before the commissioner regular, the petitioner would not have been bound to answer the question put to him, nor guilty of contempt for refusing to answer it, after claiming his privilege; that the provision in our state constitution (sec. 8, art. I) that "no person shall be compelled in any criminal case to be a witness against himself," was intended to be as comprehensive as the privilege of a witness at the common law (*East India Co. v. Campbell*, 1 Ves. Sen., 246-7), and to exempt witnesses from answering questions under any circumstances where such answer would tend to criminate themselves, and this constitutional right cannot be taken away even by a statute which provides that though the witness shall be compelled to testify against himself, yet such testimony shall not be used against him (*Emery's Case*, 107 Mass., 172, 182-3); that no one can be punished for having refused obedience to a void statute (*Cooley's Con. Lim.*, 188; *Strong v. Daniel*, 5 Ind., 348; *Astrom v. Hammond*, 3 McLean, 107); and that therefore, although in general a mere error of a court or magistrate having jurisdiction to commit for contempt cannot be reviewed on *habeas corpus*, yet the petitioner should be discharged on this writ, because the order of imprisonment for refusal to answer the question put, being in violation of a constitutional right, was void.

F. C. Winkler, contra, argued, 1. That Commissioner Hunter's order of release was void. The right to hold the prisoner by virtue of the original order of arrest made by the county judge, did not cease on the entry of judgment. The object of such an order is to hold the defendant to bail; and the liability of the bail is, "that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein," meaning, clearly, an execution against the body. The bail therefore, are liable to the

In re Kindling.

plaintiff if the defendant fails to render himself on an execution against the body legally issued at any time. *Appleby v. Robinson*, 44 Barb., 316. If no bail is given, the body remains in custody for the same purpose. The statute (R. S., ch. 127, sec. 9; Tay. Stats., 1453, § 10) points out the mode by which the defendant may be discharged at any time "before execution;" i. e. execution against the body (*Bostwick v. Goetzel*, 57 N. Y., 582); and this implies that during that time the order holds him, and the method of release provided is exclusive. In case of an escape, the sheriff is liable as bail until execution against the body (R. S., ch. 127, sec. 25; Tay. Stats., 1456, § 26), and could give bail for him at any time before such execution, and of course could also recapture and hold him. Whit. Pr. (3d ed.), 434. And the plaintiff is not obliged to resort to his execution against the body *in the first instance*, so cutting off his right to an execution against property. Our statutes on this subject are like those of New York, except that they omit the provision of the latter requiring the plaintiff, where the defendant is in actual custody, to charge him in execution within three months after entry of judgment. Here abuse is prevented by empowering the court to reduce the bail at any time while defendant remains in prison. Such being the law, the court commissioner had no authority to order the prisoner's release. The law directs how a writ shall be executed, and with that execution the court itself cannot interfere; although the court, on motion might vacate the order of arrest, as the court, also, may always review an order of the judge at chambers. The motion before Mr. Hunter was not to set aside the order of arrest, and his order does not pretend to set it aside, but directs the release in spite of it. 2. The affidavit of Mr. Winkler gave Commissioner Thompson jurisdiction. *Miller v. Adams*, 52 N. Y., 409; *In re Perry*, 30 Wis., 268. 3. Having jurisdiction, the commissioner was authorized to examine the defendant, and it was necessary for him to pass upon the propriety

In re Kindling.

of questions propounded. His judgment is subject to review, but cannot be called in question collaterally. If the order to answer in this case was erroneous, it can be corrected on a direct proceeding for a review, but not on *habeas corpus*. If the answer to the question asked would have tended to "criminate" the prisoner, he was privileged from answering it. Whether it would have had that tendency, depends on the construction to be given to secs. 71, 72, ch. 165, R. S.* If the words "any other state or country" in the former mean a country beyond the limits of the United States, then the answer to the question might criminate him; otherwise not. As to the construction of this statute, see *Stanley v. The State*, 24 Ohio St., 166; *Comm. v. Uprichard*, 3 Gray, 434. The constitutional provision (Const. of Wis., art. I, sec. 8), does not apply, but the case is governed by the common law rule. *In re Falvey*, 7 Wis., 630. There is here no imprisonment for "debt arising out of or founded on contract." Even if the action were one for debt, the proceeding is in the nature of a *ne exeat*, which does not conflict with the constitution. *Dean v. Smith*, 23 Wis., 483; Cooley's Con. Lim., 180.

The court ordered a reargument, on the constitutional power of the legislature to authorize, 1. The judge of a circuit court at chambers, in term time, to make an order dis-

*These sections are as follows:

"Sec. 71. Every person who shall feloniously steal the property of another in any other state or country, and shall bring the same into this state, may be convicted and punished in the same manner as if such larceny had been committed in this state, and in every such case, such larceny may be charged to have been committed in any town or city into or through which such stolen property shall have been brought.

"Sec. 72. Every person prosecuted under the last section may plead a former conviction or acquittal for the same offense in another state or country; and if such plea be admitted or established, it shall be a bar to any further or other proceedings against such person for the same offense."

 In re Kindling.

charging a prisoner from arrest or imprisonment under process or order of the court. 2. Such a warrant, nonbailable in the first instance, as provided in §§ 100, 101, ch. 134, Tay. Stats., supplementary to any judgment, whether recovered *ex contractu* or *ex delicto*. 3. The judge of the circuit court at chambers, in term time or vacation, to issue such a warrant. 4. The punishment as for contempt of court, of disobedience of an order made by the judge of a circuit court at chambers, not actually made an order of the court. 5. The issuing of an attachment by the judge of a circuit court at chambers for a contempt.

The court also made, an order at the same time, that the prisoner be committed, until its further order, to the custody of the sheriff of Dane county.

On the 27th of August, the sheriff made a further return, from which it appeared that after a hearing upon an order to show cause, the county court of Milwaukee county had made an order, August 25th, vacating the order of Commissioner Hunter of August 4th, for the release of the prisoner, on the ground that it had been erroneously made. On the 30th of the same month, *Kindling* appealed to this court from that order.

By stipulation, the cause was again submitted upon printed briefs, viz.: that of *Mr. Carpenter* for the petitioner, and that of *Jenkins, Elliott & Winkler, contra*.*

*The following provisions of the constitution of this state were cited by counsel in their arguments:

Art. I, sec. 16. "No person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied."

Art. I, sec. 8. "No person * * * shall be compelled in any criminal case to be a witness against himself."

Art. VII, sec. 2. "The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate and in justices of the peace." Sec. 11. "The supreme court shall hold at least one term annually. * * A circuit court shall be held at least twice in each year, in each county of this state. * * * The judges of the

In re Kindling.

Mr. Carpenter argued substantially as follows:

I. The legislature cannot confer upon court commissioners judicial powers exceeding the powers of a judge at chambers *at the common law*; and these are limited to the details of practice, and do not extend to the determination of any substantial right between the litigants. It is said that the proviso in sec. 23, art. VII of the constitution, is satisfied if the statutes conferring power upon court commissioners give the circuit judges the same power. But the legislature is not authorized to confer any judicial power on the circuit judges. The judicial power of the state—all of it with a single exception—is vested by the constitution in the *courts*, and cannot be diverted to the *judges*. The intention of the framers of the constitution on this subject is plain. Masters in chancery exercised many important judicial functions. The constitution forbids the office (art. VII, sec. 19), and thus compels the *courts* to exercise these functions. This provision is kindred in spirit to that of the 23d section, which restricts the powers of these persons *to be appointed*, to the narrow limit of power exercised by judges at chambers. As the legislature is not authorized to vest any judicial power in circuit judges, the proviso to sec. 23 manifestly refers to some certain and well known *quantum* of judicial power; and this must be the common-law power of a judge at chambers in regard to causes pending in court: a power incident to the jurisdiction of the court of which he is a judge. By the common law, apart from all statutory provisions, the judges of the common law courts have from time immemorial exercised at chambers, in

circuit courts may hold *courts* for each other, and shall do so when required by law." Sec. 19. "The testimony in cases in equity shall be taken in like manner as in cases at law; and the office of master in chancery is hereby prohibited." Sec. 23. "The legislature may provide for the appointment of one or more persons in each organized county, and may vest in such persons such judicial powers as shall be prescribed by law: *provided*, that said power shall not exceed that of a judge of the circuit court at chambers."

In re Kindling.

vacation as well as in term time, jurisdiction "over certain minor and practical *proceedings, especially irregularities*, that arise in conducting an action or defense." 3 Chitty's Gen. Pr., 19. But disobedience of an order made at chambers can be punished only by the court itself, after the order has been made a rule of court. Chitty, *ubi supra*; *Prescott v. Roe*, 9 Bing., 104; *Baker v. Rye*, 1 Dowl., 689; *Hincliffe v. Jones*, 4 id., 86; 1 Tidd's Pr., 511. The court will take no notice of the order until it is made a rule of court (*Jameson v. Raper*, 3 Moore, 65, note); and it cannot be made a rule of court until the following term (*King v. Price*, 2 Dowl., 233); and the motion to make it a rule of court must be separate from that to attach for disobedience of the order (*Stainland v. Ogle*, 3 Dowl., 99). After such order has been made a rule of court, it becomes the act of the court, and the judge's power to make it cannot be questioned. *Wilson v. Northrup*, 4 Dowl., 441. The decision of a judge at chambers may be reviewed by a single judge in term. *King v. Meyers*, 5 Dowl., 686. After a judge's order has been made a rule of court, a motion to vacate must be directed against the *rule*, not the order. TINDAL, C. J., in *Clement v. Weaver*, 1 Dowl. N. S., 193. Many acts of parliament have increased the powers and enlarged the jurisdiction of the English judges at chambers; but these statutes, having been enacted since our revolution, have no effect here. The English statutes have, in many instances, vested in the judges at chambers powers which do not relate to pending causes, and are no part of chamber jurisdiction proper; and as to such statutory powers the court exercises no appellate jurisdiction. It is only where the judge at chambers acts *as the delegate of the court* and exercises its jurisdiction, that an appeal lies to the court. *Railway Co. v. Fielden*, 15 Jur., 19. An examination of the works of practice, and of the cases, will show conclusively that the power of a judge at chambers extends only to the making of such rules or orders as are necessary to speed the causes pending in

In re Kindling.

court, clear away the technical obstacles, and thus enable the court to come more speedily to a hearing of the merits of the causes. But every issue, whether of law or fact, arising in the cause must be determined by the court. I cannot find an instance in which a demurrer has been passed upon at chambers; and it has been decided that a judge at chambers cannot order a *false* plea to be stricken out. *Milley v. Walls*, 1 Dowl., 648. The powers of a judge at chambers, at the common law, are exercised as preparatory to an exercise of judicial power, that is, the determination of the rights of the parties on the merits of the case; and do not extend to the adjudication of any substantial right between the parties.

II. The whole scheme of "proceedings supplementary to execution" is unconstitutional. When our constitution was adopted, it was one of the well established heads of equity jurisdiction to enforce the judgments of courts of law upon the property of reluctant debtors, by creditors' bill; and this, *independent of statutory provisions*. *Hendricks v. Robinson*, 2 Johns. Ch., 283; *Brinkerhoff v. Brown*, 4 id., 671; *McDermott v. Strong*, id., 689; *Spader v. Davis*, 5 id., 280; *Egbert v. Pemberton*, 7 id., 208; *Spader v. Hadden*, 20 Johns., 565; *Bean v. Smith*, 2 Mason, 252; *Tappan v. Evans*, 11 N. H., 311; *Waterman v. Cochran*, 12 Vt., 699. The statute (Tay. Stats., 1564-5) provides that after execution returned unsatisfied, the judgment creditor "is entitled to an order from the judge of the court, or a county judge or court commissioner," requiring the judgment debtor to appear *before such judge or commissioner*. It then provides a code of procedure for the case, vesting in the judge or commissioner substantially the powers of a court of equity on the old creditors' bill, with power (p. 1567, § 111) to punish disobedience of any person, party or witness, as for a contempt, to appoint a receiver, etc., etc. This court has repeatedly held, what is apparent from the statute itself, that its provisions are, and were intended to be, a substitute for the proceedings on cred-

In re Kindling.

itors' bill in a court of equity, and that they abolish the old proceedings. *In re Remington*, 7 Wis., 643; *Graham v. R. R. Co.*, 10 id., 459; *Seymour v. Briggs*, 11 id., 196. In other words, the statute vests in a circuit judge, county judge or court commissioner, the judicial power of the state in a matter of equity; whereas the constitution vests this power in the courts. If the legislature may vest in a judge or court commissioner one head of equity jurisdiction, it may another, and all others; and it may do the same thing in matters of law, and thus divert from the courts all their constitutional jurisdiction. As to those provisions of the statute which authorize judges and commissioners to appoint receivers, punish for contempt, and to adjudicate upon substantial rights of the parties litigant, and to acquire jurisdiction over persons *not parties* to the action, adjudicate upon their rights of property, and render judgments, — the conflict between these and the policy and language of the constitution is especially plain and palpable. These are clearly judicial powers, powers reaching to the determination of substantial rights; and they are filched from the courts, in which the constitution vests them, and conferred upon judges out of court, and upon court commissioners, in violation of the constitution.

III. I cannot find that by the common law a judge at chambers was ever authorized to order an arrest, in cases where the defendant might properly be arrested. Such power has been conferred by recent statutes (1 and 2 Vic., c. 110, sec. 3; 78 Stats. at Large, p. 543). By the *ancient* common law, no defendant could be arrested upon *mesne* process for civil injuries unaccompanied by force. Subsequent statutes, passed before our revolution, gave a right to commence certain actions by *capias*. But then the writ issued out of the court as a matter of course, without special direction; the arrest was by command of the court; and the *capias* had to be *tested* in term time. Tidd's Pr., 128-9. But inasmuch as the jurisdiction of a judge at chambers is merely an incident

In re Kindling.

of the jurisdiction of the court, it is worthy of consideration whether, in cases where the defendant may be arrested and held to bail for his appearance merely, the arrest is not so incident or collateral to the main object of the suit as to fall within the power of a judge at chambers; and whether the absence of precedents for such judge's order should not be ascribed to the fact that the *capias*, in the proper cases, went without special direction or order of the court. On the other hand, it may well be said that an arrest of the person — especially if it is to be held, as claimed in the argument of this case, that such imprisonment may, at the election of the plaintiff, be continued during the natural life of the defendant, — should be the result of original and not delegated judicial power.

IV. What a judge may do at chambers, he may undo at chambers; and if he can order an arrest, there would seem to be no objection, on the score of power, to his ordering a release from the arrest. *Burness v. Guiranovich*, 4 W., H. & G., 520; *Thompson v. Becke*, 4 Q. B., 759. Moreover it is well settled that a judge at chambers for new and sufficient reasons could discharge from custody under the order or process of the court. He could never make an order, in opposition to the order or process of the court, which would amount to or have the effect of a final adjudication upon any substantial right, but he could control the execution of process of the court, and even its judgments, until the parties could be again heard in court. *Doe v. Roe*, 11 A. & E., 333; *Jameson v. Raper*, 3 Moore, 65, note; *Bartlett v. Stinton*, L. R., 1 C. P., 483; *Plomer v. Ball*, 5 A. & E., 823; 3 Chitty's Gen. Pr., 19.

V. Applying these principles to the case at bar, 1. If the original order of arrest was invalid, this cause for the detention falls to the ground. 2. If that order was valid, it was within the power of a judge at chambers, or court commissioner, for sufficient reasons, to discharge from custody. The order of Commissioner Hunter for such discharge was prop-

In re Kindling.

erly made. The judgment creditor's election to proceed by an execution against property ought to be regarded as an abandonment of the remedy by execution against the body, at least until the former remedy is exhausted. *Ex parte Knowell*, 13 Ves., 192. By the common law, the commitment of the debtor in execution was a satisfaction of the debt; but by the statutes of this state (R. S., ch. 162, sec. 11), after the remedy by imprisonment is exhausted, execution may be issued against the property. Sec. 7, ch. 134, R. S., provides that in cases where the defendant *might have* been—that is, might have been but was not—arrested, execution may go against property before execution against the body, but only in that case. But the case where an arrest *was in fact* made, is regulated by sec. 10, and the language “execution *may* issue” against his body, should be read, *shall* issue, etc. *Cutler v. Howard*, 9 Wis., 309. Then sec. 11 provides that while the body is held in execution, no execution against the property shall issue. The plain intention of these provisions is to compel the plaintiff to an election; and where the defendant is in jail under process in the action, and the plaintiff resorts to an execution against property, he ought to be held to have made his election to abandon the imprisonment. Again, the arrest under the county judge's order is by law merely a *provisional* remedy. Webster defines *provisional* as follows: “Provided for present need or for the occasion; temporarily established; temporary; as a provisional government or regulation; a provisional treaty.” It is an order to have effect until the rendition of judgment, *and no longer*. *Corwin v. Freeland*, 6 How. Pr., 244 (decided in 1851); *Bank v. Mott*, 9 Abb. Pr., 110. When these decisions were made, the New York statutes were precisely like ours in regard to provisional remedies. But even conceding that Mr. Hunter's order was erroneous, it was valid until set aside; and there was therefore no justification of the imprisonment when this writ of *habeas corpus* was applied for. *Jones v. Dow*, 15 Wis., 582. The county court

In re Kindling.

has since vacated Mr. Hunter's order; but the appeal taken by *Kindling* from this order of the court stays its effect, and leaves the commissioner's order in full force. This would be true in the absence of any statutory provision on the subject. *Hudson v. Smith*, 9 Wis., 122; *Ins. Co. v. McCormick*, 20 id., 265; *Corning v. Troy Iron Co.*, 15 How. Pr., 451; *Green v. Winter*, 1 Johns. Ch., 77; *Yeaton v. United States*, 5 Cranch, 281; *Schooner v. United States*, 6 id., 329; *Jennings v. Carson*, 4 id., 2; *Penhallow v. Doone*, 3 Dal., 54. I find nothing in our statute, which, on an appeal from an order like this, requires anything more than the giving of the undertaking for \$250, required on appeal from all orders whatsoever, to suspend the operation of the order appealed from. *Ins. Co. v. McCormick*, *supra*. 3. The order of Commissioner Thompson, committing the prisoner for the supposed contempt, was an exercise not only of a power which cannot be conferred on a court commissioner under our constitution, but of a power which the statute does not attempt to confer. Under Tay. Stats., 1564-5, §§ 100, 101, there can be no commitment except on refusal to give bail, which was not ordered in this case; and under § 111, commitment can be made only for violation of those orders of the commissioner which the practice requires should be served in writing. The refusal to answer a question is clearly not a case contemplated in this section.

Jenkins, Elliott & Winkler, *contra*, argued substantially as follows :

I. The legislative acts which have from time to time vested the circuit judge at chambers with authority to hear and determine certain judicial questions which, by the common-law practice of England, could only be heard in term, have passed unchallenged through all the courts of this state, and should not now be arraigned as unconstitutional, except with the greatest caution. By sec. 28, ch. 132, R. S. (introduced with the code), the judge was authorized to give judgment upon a frivolous pleading; an important judicial function, involving

In re Kindling.

not only the right of the party to maintain his pleading, but (as the statute was first enacted) the consequence of wholly shutting out a meritorious defense which he might have. *F. & M. Bank v. Sawyer*, 7 Wis., 279. But this section has been sustained as constitutional by this court (*Clapp v. Preston*, 15 Wis., 543), and we think correctly. The object of that clause of the constitution which vests "the judicial power of the state in a supreme court, circuit courts," etc., was to prescribe what courts we should have, and not to define the practice of those courts. For some time before the constitution was adopted, there had been, in the course of law reform, considerable relaxation, by legislative enactments, of the older, stringent rule requiring most if not all the business of a court to be done in term time. Chief Justice DENMAN, in 1838, procured the passage of an act of parliament permitting the judges of Westminster Hall to hear causes in vacation. It is difficult to believe that the convention in framing, or the people in adopting, our constitution, intended that the practice regulating what a judge might do at chambers, and what powers he could exercise only in term, should remain rigidly fixed as it was at that time. They could not in reason have so declared unless they considered the reform or change in that direction an evil one; and in that case they would have made the declaration an explicit one, instead of leaving it to vague implication. The word "court," therefore, seems to be used in the provision referred to, not in the narrow sense of a court sitting in term, but rather to designate the body which is to exercise the judicial power, without attempting to prescribe the time, place, or manner of its exercise. Except in the case of the supreme court, the courts provided for have but a single judge. In him the judicial power of the court is vested. The time and place where he shall hear causes, the manner in which decisions shall be rendered and recorded, are matters which must be within the control of the legislature. The court does not cease when its term is ended. At common law,

"terms," properly speaking, were only held by the courts at Westminster, the judges sitting in banc. The sessions or assizes, under the various commissions, are not "terms," but are held in vacation. 3 Black. Com., 60, 276 et seq.; 3 Chitty's Gen. Pr., 90 et seq. If the term "circuit courts," in sec. 2, art. VII of our constitution, means only courts sitting in term, how can a judge at chambers exercise even the slightest judicial power? Sec. 23 implies that they have exercised, possibly that they may exercise, such powers, but it confers none. The only inference that can be drawn from it is, that sec. 2 does not mean courts in term. Suppose that sec. 23 were not found in our constitution: would it then be contended that no part of the judicial power could be exercised otherwise than by the court in term? The constitution of the United States vests the judicial power in "one supreme court, and in such inferior courts as the congress may from time to time ordain and establish;" yet a vast number of acts of congress confer powers on the judges at chambers; and these have never been questioned, and have been acted on by all the great judges of the land. Among these are the bankrupt law, and many acts relating to admiralty practice. See secs. 574-6, p. 101, R. S. of the U. S. An order made, or judgment given, by a judge at chambers, where the statute authorizes it, is an order or judgment of the court, as is a rule entered by an attorney, where that authority is given, or a judgment rendered by the mere act of the clerk, on a default. *Wells v. Morton*, 10 Wis., 468.

II. It does not follow that the legislature can give a court commissioner the same power which it may confer on a judge at chambers. The officer referred to in sec. 23, art. VII, called in our statute a court commissioner, was intended to be a subordinate officer in our system, vested with strictly limited powers. The proviso, that his power shall not exceed "that of a circuit judge at chambers," cannot reasonably be said to mean, that it shall not exceed the power which it might in future be deemed wise to allow the judge to exer-

In re Kindling.

cise at chambers. We take it to mean, that it should not exceed the power ordinarily exercised by a judge at chambers at the time of the adoption of the constitution. An order of arrest is the legitimate successor of the *capias ad respondendum*, and is process of the court, like an injunction order made by a judge or court commissioner. *Isley v. Harris*, 10 Wis., 95. Where such process had been issued according to law, and the statute prescribed the method of its execution, a judge at chambers could not interfere with its regular course. He could admit a party arrested to bail, and perhaps, in some cases, under particular statutes, inquire into and determine particular questions. But the only power to which Commissioner Hunter's order of discharge could be referred, is the general, inherent power of a court over its own process; and this at common law belonged exclusively to the court, and not to the judge at chambers. It is one of those high powers, affecting important interests, which it was never intended to confer on court commissioners. *Boinay v. Coats*, 17 Mich., 411. Again, a court commissioner's powers, under sec. 23, art. VII, must be "prescribed by law;" and this seems to mean that the specific powers shall be prescribed by statute, and he shall not be allowed to range over a wide field of undefined, discretionary powers. In the power he exercises, he should have the plain, direct, explicit statute for his guide. We contend that, for this reason, the statute giving him "all the powers of a judge at chambers" is void.

III. The warrant provided for by §§ 100, 101, pp. 1564-5, Tay. Stats., is simply to arrest the defendant and bring him before a court commissioner, to be examined whether he shall be required to give bail or allowed to go without bail. We have found no constitutional provision which it violates. It is a less stringent warrant than one which requires him to give bail at once or be imprisoned. Warrants by which actions of tort are commenced before justices of the peace in this state, have always been nonbailable in the first instance. Tay.

In re Kindling.

Stats., 1357, § 30, and 1359, § 39. We think also that it could be granted by a court commissioner. At the time of the adoption of our constitution, writs of *ne exeat* were a recognized provisional remedy in a creditor's suit (*Mitchell v. Bunch*, 2 Paige, 606), and could be allowed by a judge at chambers or an "injunction master." 1 Barb. Ch. Pr., 621, 649. All writs and orders in the nature of process would be of very little practical value if they could be had only of a court in term. Proceedings supplemental to execution are but a new form of creditor's suit. Hence, by express statutory provisions, they are accompanied by the remedial processes of the court of equity—the injunction, the receiver; and it would be strange if the *ne exeat* were wanting. The warrant in question is strictly in the nature of a *ne exeat*, except that, with greater leniency, the defendant is allowed a hearing before the holding to bail, or imprisonment in default of bail, is made absolute.

IV. But the subsequent proceedings before a court commissioner, authorized by the terms of the statute—the hearing of testimony, making orders under § 106, and enforcing them under § 111—certainly exceed the powers of a judge at chambers as generally understood twenty-five years ago. They amount in substance to nothing less than the trial of a suit in equity, and the pronouncing and enforcement of the decree. If it were an original question, the statute, so far as it confers these powers on court commissioners, would probably be held void. But that would not make the initiatory proceedings a nullity. The proceedings are in the case, and under the immediate control of the court. *Barker v. Dayton*, 28 Wis., 367. If the commissioner cannot act beyond issuing the warrant and determining whether it shall be made absolute, the presumption must be, that all subsequent proceedings will be had before the court or the judge. On this view, the commitment for refusing to answer was in excess of the commissioner's power, but the warrant was good. But is not this

In re Kindling.

whole question closed against inquiry? The statute of supplemental proceedings, with full power in the county judge as well as the circuit judge, is nearly twenty years old; with all its present powers in the court commissioners, it is over fifteen years old. Cases under it must be counted by many hundreds, if not thousands. There is not a power granted by it that this court has not affirmed by express adjudication. And it has always been treated as a valid act. *Graham v. R. R. Co.*, 10 Wis., 459; *Second Ward Bank v. Upmann*, 12 id., 499; *Brown v. Hebard*, 20 id., 326; *In re Mary J. O'Brien*, 24 id., 547; *Barker v. Dayton*, 28 id., 367; *Gould v. Dodge*, 30 id., 621; *In re Perry*, id., 269; *Lamonte v. Pierce*, 34 id., 483. Even the power of the court commissioner to punish for contempt, in disobedience of his order, is expressly affirmed in *In re Perry* and *In re O'Brien*, *supra*.

V. The order of Commissioner Hunter having been set aside by the county court since the former argument, the original order of arrest remains in full force. If the appeal from the vacating order of the county court suspends the operation of such order, then the motion to the county court to set aside Mr. Hunter's order, which is in effect an appeal from it (*Moore v. Cord*, 13 Wis., 413; *Schauble v. Tietgen*, 31 id., 695; *Tidd's Pr.*, 511), must equally suspend the operation of said last mentioned order.

VI. A judge at chambers may make an order of arrest. It is but another form of *capias ad respondendum*. That writ, at the time of and prior to the adoption of the constitution, generally issued "of course;" and where an order was required, it was made by a single judge at chambers. 3 Chitty's Gen. Pr., 325, 326; 1 Burr. Pr., 95, 97. In fact all writs and process, and orders for them, not issuable of course, were, as in practice they must be, granted at chambers.

VII. We need not reargue the point that the entry of judgment does not *ipso facto* put an end to the order of arrest. It is contended that in sec. 10, ch. 134, R. S., the word *may*

In re Kindling.

means *shall*, and hence that execution against the person must be issued immediately. But that section is derived from sec. 5, p. 364, vol. 2, R. S. of New York of 1829, where it could have no such meaning, as the same statute (p. 556, secs. 36, 37) provided for a discharge of the defendant if he was not charged in execution within three months. The passage cited from *Corwin v. Freeland* is the merest *dictum*. *Bank v. Mott* relates to an *amendment* to the New York code, which was never adopted here, but implies that the law was previously otherwise.

RYAN, C. J. The sheriff's supplemental return greatly simplifies this case. Under the order of the county court vacating the order of the court commissioner which assumed to discharge the prisoner from custody, the proceedings before both the court commissioners become immaterial to the detention of the prisoner; leaving it resting on the original order of arrest made by the judge of the county court. We are none the less under obligation to counsel for the learning and ability of the briefs submitted on the reargument which we had ordered, discussing grave and delicate questions not now in the case.

The constitution vests the judicial power of the state in courts which it establishes or authorizes to be established, to be held by judges whose offices it creates or authorizes to be created. This exhausts the judicial power. *Att'y Gen. v. McDonald*, 3 Wis., 805; *Gough v. Dorsey*, 27 id., 119. But the courts of record so established are courts proceeding according to the course of the common law. *Putnam v. Sweet*, 2 Pinney, 302; *Callanan v. Judd*, 23 Wis., 343. And the judges of these courts take, under the constitution creating their offices, the powers of judges of such courts at the common law, including the powers commonly possessed by them at chambers, at the time of the adoption of the constitution. *Waterman v. Raymond*, 5 Wis., 185; *Conroe v. Bull*, 7

In re Kindling.

id., 408; *Re Remington*, id., 643; *Re Gill*, 20 id., 686. Such powers of judges of the circuit court at chambers are expressly recognized in the constitutional provision authorizing like judicial powers to be conferred on other officers.

At the common law, before 52 Hen. III, ch. 23, 13 Ed. I, ch. 11, 25 Ed. III, stat. 5, ch. 17, and 19 Hen. VII, ch. 9, arrest on mesne process in civil actions was authorized only for tort *vi et armis*. Petersdorff on Bail, 4; 3 Chitty's Gen. Pr., 324; 1 Tidd's Pr., 128; 3 Black., 292. Under these statutes, prior to 12 Geo. I, ch. 29, arrest was authorized on *capias ad respondendum* in all civil actions, without affidavit or order; bail being taken for the sum laid in the *ac etiam* clause, under 28 Hen. VI, ch. 9. But under the temporary act of 12 Geo. I, ch. 29, made perpetual by 21 Geo. II, ch. 3, arrest was authorized on mesne process in civil actions, only upon affidavit of cause of action; the sum sworn to be due being indorsed on the writ, and bail required for that amount only. In cases of unliquidated damages, however, whether *ex contractu* or *ex delicto*, in which a sum certain could not be sworn, arrest was authorized only upon order of the court or judge, made upon affidavit of cause of action, and fixing the amount of bail to be taken. This appears to have been the first use of orders to hold to bail. And even in cases of liquidated damages, in which arrest was authorized upon affidavit only without order, orders might always be made and sometimes were made to hold to bail. 3 Chitty's Gen. Pr., 324, 326; 1 Tidd's Pr., 128, 172; *Fleetwood v. Poictier*, Barnes' Pr. Cases, 67; *Le Writ v. Tolcher*, id., 79; *Reynoldson v. Blades*, id., 108. These cases were in the common pleas, but the same practice prevailed in all the superior courts of common law.

In practice, orders to hold to bail were commonly made by the judges at chambers, although they could generally be discharged by the court only. Chitty, Tidd, *ubi supra*; *Hadderweek v. Catmur*, Barnes' Cases, 61; *Russel v. Gately*, id.,

In re Kindling.

76; *Treherne v. Gressingham*, id., 87; *Stapleton v. Stark*, id., 109. The cases in Barnes were all long prior to 1 and 2 Vict., ch. 110, which counsel for the prisoner relied on as first giving authority to judges at chambers to make orders to hold to bail. See also *Thompson v. Becke*, 4 Q. B., 759, and *Burness v. Guiranovich*, 4 Exch., 520, after 1 and 2 Vict.

The English statutes cited, prior to the 1 and 2 Vict., came here with the common law and as part of it. *Coburn v. Harvey*, 18 Wis., 147; *Spaulding v. Railway Co.*, 30 id., 110. And, until imprisonment for debt was modified or abolished in many of the states, the English rule prevailed very generally in this country from the beginning. Encyc. Am., "Capias," "Debtor and Creditor"; 3 Tucker's Black., App., 37; 2 Kent, 397; Bouvier's Inst., sec. 2802; 5 and 9 Dane's Abr., ch. 150; Graham's Pr., 492; 1 Burrill's Pr., 88, 97, 328. And the practice of proceeding on a judge's order to hold to bail in all cases of arrest on mesne process seems to have been very common. This was certainly the practice established by statute of the territory, when the state constitution was adopted. R. S. 1839, 264.

The state constitution abolishes imprisonment for debt arising on contract. This superseded the territorial statute so far as it related to actions *ex contractu*; but so far as it related to actions *ex delicto*, that statute appears to have remained in force until the revision of 1849, when it was repealed. R. S. 1849, ch. 157. That revision continued the practice in actions of tort. R. S. 1849, ch. 91. And, with exceptions not material here, the same practice of arrest on mesne process, or at any time before judgment, in actions of tort, upon order of the judge of the court, is still continued by law. R. S. 1858, ch. 127; *Usley v. Harris*, 10 Wis., 95; *Cotton v. Sharpstein*, 14 id., 226; *Re Bowen*, 20 id., 300; *Gibbs v. Larrabee*, 23 id., 495; *Wagner v. Lathers*, 26 id., 436.

And we cannot doubt that, under the constitution, the judges of courts of record have power at chambers to make

In re Kindling.

orders to hold to bail, in proper cases, in actions brought in their courts.

The arrest of the prisoner for the tort with which he was charged by affidavit, upon the order of the judge of the county court, in which he was sued for the tort, was therefore lawful; and the order warrants his present imprisonment, unless its force has been in some way arrested or spent.

We understand the ground on which the court commissioner made the order, since revoked, discharging the prisoner from custody, and which was relied on by counsel here, is that the right of imprisonment on mesne process expires upon recovery of judgment in the action. If that were so, it would be difficult to see any useful purpose in the right of arrest.

Bail upon arrest, and imprisonment in default of bail, go for the same purpose. "When the defendant is regularly arrested, he must either go to prison for safe custody, or put in special bail to the sheriff. For the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered whether the sheriff detains his person or takes sufficient security for his appearance, called bail . . . because the defendant is bailed or delivered to his sureties, upon their giving security for his appearance, and is supposed to continue in their custody instead of going to gaol." "Upon the return of the writ, . . . the defendant must appear according to the exigency of the writ. This appearance is effected by putting in and justifying bail to the action, which is commonly called putting in bail above." "These bail . . . undertake that if the defendant be condemned in the action, he shall pay the costs and condemnation or render himself a prisoner, or that they will pay it for him." 3 Black., 290, 291.

Under our statute, the distinction between bail below and bail above is very much done away; the bail taken by the sheriff, if accepted or justified, standing as bail to the action. And the statute itself gives the undertaking of the bail, not mate-

 Johnson vs. Filkington.

rially different from the common-law bail-piece, "that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment therein."

When the defendant fails to give bail or is surrendered by his bail, before judgment, his liability to detention corresponds with the liability of bail to the action; and his detention, unless otherwise discharged by the court, must abide a *capias ad satisfaciendum*. When that is issued and served, the imprisonment on mesne process ceases, and thenceforth rests upon the execution against the body. *Re Mowry*, 12 Wis., 52.

What may be the remedy of the prisoner, consistent with the validity of his detention, if the plaintiff should improperly and oppressively delay taking him in execution, is not a question before us on this writ. It is conclusive of the case before us, that his present detention is regular and lawful. And it is therefore our duty to remand him to the custody of the sheriff of Milwaukee county.

By the Court. — Ordered accordingly.

 JOHNSON VS. FILKINGTON.

CONTRACT. (1) *Revocation of order for work and materials. Presumption.*

EVIDENCE: (2) *Properly rejected where it does not tend to prove the cause of action alleged.*

AMENDMENT OF COMPLAINT. (3) *Not admissible to substitute new cause of action.*

1. An order for materials and work may be revoked at any time before acceptance; and where a revocation is shown, it will be *presumed* to have been in time, until the contrary appears.
2. Evidence is inadmissible which does not tend to prove *the cause of action alleged*.
3. In an action to enforce an alleged lien on defendant's house for work done and materials furnished under contract, there was no error in refusing

Johnson vs. Filkington.

plaintiff leave, at the trial, to *substitute a new cause of action*, by amending the complaint so as to allege damages accruing to him from defendant's refusal to permit him to perform the contract.

APPEAL from the Circuit Court for *Milwaukee* County.

Action for materials alleged to have been furnished and labor performed to the value of \$26.60, pursuant to a contract, in the construction of a dwelling house for the plaintiff, viz., in erecting on said dwelling house a lightning rod. The complaint sets forth a petition for a lien on said dwelling house, etc., to the amount of said demand, alleged to have been filed in the proper clerk's office within the time prescribed by statute; and it demands judgment in the form usual in actions to enforce such liens. The answer was, in substance, that defendant had revoked the order for said rod after it was given, and that the rod was afterwards erected without his knowledge or consent, and plaintiff had refused to remove it at his request.

On the trial, plaintiff testified that he made a contract with defendant for the erection of a lightning rod on the house of the latter, about July 21, 1873, which was reduced to writing at the time; and he produced in evidence defendant's written order for the rod, of the date just stated. He further testified that he put up the rod two or three weeks after the order was given; that it still remained upon the house; that defendant, though several times requested, had never paid for it; and that before the rod was erected, he (plaintiff) had received from defendant a letter which in terms countermanded the order. The petition for a lien set out in the complaint was read in evidence; but the court held (for reasons which need not be stated here) that it was insufficient to establish a lien. Plaintiff also testified that some time after the erection of the rod, defendant promised to pay for it. Defendant testified, in substance, that he refused to pay for the rod, or make a promise of payment, and requested plaintiff to take it away. Plaintiff asked leave to amend the complaint so as to allege

Johnson vs. Filkington.

therein that if, upon defendant's countermanding his order, plaintiff had desisted from the performance of the contract on his part, he would have suffered damage to the amount of \$26.60. The amendment was refused, as was also plaintiff's offer to prove the fact so proposed to be alleged.

The court instructed the jury that after defendant's countermand of his order, plaintiff could not put up the rod and claim pay for it unless there had been a new arrangement between the parties; and it submitted to them the question whether defendant afterwards promised to pay for the rod. Verdict for the defendant; new trial denied; and appeal by the plaintiff from a judgment on the verdict.

The case was submitted by both sides on briefs.

McMullen & Houts, for appellant, argued, *inter alia*, that, to make a good defense, it should have been alleged and shown that defendant's countermand was given before plaintiff had been to any expense and trouble on account of the order; and that, plaintiff having offered to prove affirmatively the loss and damage in case he had desisted from erecting the rod, the evidence should have been admitted even under the original complaint (*Ganson v. Madigan*, 9 Wis., 146; 13 id., 67; and 15 id., 144); and that at least the court should have permitted the amendment, and then admitted the evidence. *Bonner v. Home Ins. Co.*, 13 Wis., 677; *Gardiner v. Kellogg*, 14 id., 605; *Wood v. Schettler*, 23 id., 501; *Danley v. Williams*, 16 id., 581; *Pellage v. Pellage*, 32 id., 136; *Giffert v. West*, 33 id., 617; *Matteson v. Ellsworth*, id., 488; *Smith v. Schulenberg*, 34 id., 41; *Pierce v. Carey*, 37 id., 232; *Masterton v. Mayor, etc.*, 7 Hill, 61; *Clark v. Marsiglia*, 1 Denio, 317; Judge Dixon's note, 5 Wis., 627. 2. If plaintiff had been permitted to show his damages as proposed, he could have enforced a lien upon the premises for the amount of such damages, if his petition was sufficient. Phillips' Mechanics' Liens, §§ 139, 149, and note; *Bank of Pa. v. Gries*, 35 Pa. St., 423; *Morrison v. Hancock*, 40 Mo., 561; *Beckel v. Petticrew*, 6

Johnson vs. Filkington.

Ohio St., 247. Counsel also argued at length the sufficiency of plaintiff's petition for a lien.

Rogers & Hover, for respondent, contended that after defendant had countermanded his order, plaintiff's only remedy was by an action for damages for breach of the contract (*Clark v. Marsiglia*, 1 Denio, 317), and for such damages he would have no lien; and that the proposed amendment, proposing to substitute a new cause of action, was properly denied. 12 Wis., 378; 19 id., 82; 23 id., 199.

COLE, J. It seems to us the question whether the petition offered in evidence was sufficient to establish a lien, or not, becomes immaterial in view of the verdict and of the undisputed facts in the case. The jury found, under the direction of the court, that the defendant neither accepted the rod after it was put up on the house, nor made any promise to pay for it. No lien could, therefore, be claimed on the ground that the defendant had accepted the rod and had agreed to pay for it. The court also instructed the jury, in substance, that it was an admitted fact in the case that the defendant sent the plaintiff a written countermand of the order for the rod before the same was put up on the house, and that after this countermand the plaintiff had no right to proceed and put up the rod and claim pay for it. That such a written revocation was sent and received, there can be no doubt, because the plaintiff himself admits it in his testimony given on the trial. The question then arises as to what were the rights of the parties after the revocation of the order.

There can be no doubt about the right of the defendant to withdraw his order for the rod at any time before it was accepted by the plaintiff. For, until acceded to, it was a mere offer or proposal, liable to be retracted; and an acceptance, even, subsequent to the retraction, would be of no avail. *M. E. Church of Sun Prairie v. Sherman*, 36 Wis., 404; *Metcalf on Contracts*, p. 15. It does not appear that the

Johnson vs. Filkington.

plaintiff had accepted the order before it was countermanded; and in the Sherman case above cited it was held that the presumption would be that the revocation was in time, until the contrary appeared. The order of July 21, 1871, was sent to the plaintiff, as we understand the testimony, and was not taken by an agent of his. The parties lived some little distance from each other, and it does not appear how that order was sent, whether by mail or otherwise. But it is a significant fact that the plaintiff, though sworn on his own behalf, did not state that he had received and accepted the order before it was revoked. Under this state of the proof, we see no objection to the direction of the court given the jury to find that the order for the rod was countermanded, and that the plaintiff, after that, had no right to proceed and perform the work as though the order were in force. For certainly the revocation of the order before the rod was put up, was not a fact left in dispute by the evidence.

Another exception relied on for a reversal of the judgment was the exclusion of certain evidence offered on the part of the plaintiff. The plaintiff offered evidence to prove the loss or damage he would have sustained if, after receiving the order, he had, upon its revocation, desisted from doing the work in accordance with the order. This evidence was objected to, and ruled out. That the evidence was inadmissible, as in no way tending to prove the cause of action set forth in the complaint, is a proposition too plain for argument. Says Prof. Greenleaf: "It is an established rule, which we state as the *first rule* governing in the production of evidence, that the evidence offered must correspond with the allegations, and be confined to the point in issue." 1 Greenl. Ev., § 51. Within this fundamental rule, the evidence was properly excluded. But the plaintiff, in connection with this evidence offered, asked leave to amend his complaint by alleging that if, upon the order being countermanded, he had desisted from putting up the lightning rod,

Johnson vs. Filkington.

he would have suffered loss and damage to the amount which he claimed to recover in the action. This amendment was objected to by the defendant, and the court refused to allow the amendment to be made. This ruling is relied upon as error.

It is very obvious that the proposed amendment entirely changed the cause of action stated in the complaint. The plaintiff in substance claimed to have performed work and furnished certain materials, namely, a lightning rod, in and about the construction of a dwelling house for the defendant, and that this was in pursuance of a contract entered into between the parties. And he asked that the value of the work done and materials furnished should be adjudged a lien upon the premises. Failing to establish this cause of action, because it appeared that the defendant had revoked the order for the work and materials, the plaintiff, by the amendment, sought to convert the action into one for damages for a breach of the contract. The amendment presupposes that the order had been accepted so that it was binding upon the parties. Now if the defendant undertook to revoke the order after it had been accepted, and refused to let the plaintiff put up the rod, he might have been liable to pay such damages as the plaintiff had sustained by this violation of the contract. But that is a cause of action quite different from the one stated in the complaint. One arises out of the performance of a valid contract; the other is for a refusal to permit the plaintiff to perform the contract. It is therefore apparent that by the amendment the plaintiff sought to substitute this cause of action for a breach of the contract for the one originally counted upon in the complaint. "This is not amendment, but substitution." We know of no case which has come before this court, where the power of amendment has been carried to the extent of allowing one cause of action to be substituted for another. And the refusal of the court to allow the proposed amendment, we think, was correct.

Harrison, Judd & Co. vs. Crocker.

This disposes of all the material points in the case.

By the Court.—The judgment of the circuit court is affirmed.

HARRISON, JUDD & Co. vs. CROCKER.

(1) *Exceptions.* (2) *Waiver of breach of warranty by giving notes for full price.* (3) *Instructions as to burden of proof.*

1. On a single exception to a refusal to give two instructions asked by the appellant, this court can only consider whether *both instructions, taken together*, are a correct statement of the law.
2. Defendant gave his notes here in suit for the full purchase price of a reaper, after he had used and tested it during one season; but defends against the notes for breach of warranty as to the quality and capacity of the reaper. There was evidence that he gave them at the solicitation of plaintiff's agent, to enable the latter to settle with his principals, and upon a promise that it should make no difference in his liability. *Held*, that the giving of the notes was not *per se* a waiver of the breach of warranty.
3. There being conflicting evidence as to whether defendant used ordinary care and skill in testing said reaper, the jury were instructed that "the presumption is that the machine was operated with ordinary care and skill, and, unless the contrary be shown, the jury must assume such to be the fact;" and that, "in the absence of testimony to the contrary, the presumption would be that ordinary care and skill were used" in this case. *Held*, that in the actual state of the proofs, the question what presumption would arise in the absence of all evidence, was not involved in the cause; the question of fact should have been submitted to the jury upon the evidence; and the instructions were erroneous, because calculated to mislead the jury to plaintiff's prejudice.

APPEAL from the Circuit Court for *Dunn* County.

Action on two promissory notes of the defendant, dated August 22, 1870, for \$100 each, with interest, payable June 1, 1871, and June 1, 1872, respectively. Answer, in substance, that the notes were given for a combined reaper and mower sold by plaintiffs, through their agent, to defendant, and war-

Harrison, Judd & Co. vs. Crocker.

ranted to be sound and perfect in all its parts, and capable of doing as good work as any other similar machine in use in this state; and that such warranty was fraudulent, and the machine worthless. Defendant also set up a counterclaim for damages from such breach of warranty, in the sum of \$200. Reply, in denial of the counterclaim.

On the trial, defendant was permitted, against objection, to open and close. It appeared that the machine was purchased before the harvest of 1870, with warranty as alleged, and that it was put up by one Wallace, plaintiff's agent. Defendant's evidence tended to show that the machine was run by persons who had had some experience in working with such machines; and that it did not do good work as a reaper, and broke down with great frequency, and was of little or no value. Defendant testified: "Giving the notes was delayed sometime, as I was not satisfied. Mr. Wallace claimed the company were crowding him up, and said it would make no difference, and I gave the notes." "Wallace told me that in order to make it all right with the company, I had better give the notes, and he would make it all right with me about the machine; that if it was not all right, he would make it right; and I gave the notes." It appeared from the evidence that the machine had been used by defendant at least three years after his purchase, and was still on his farm. Defendant testified that when it was purchased, nothing was said about returning it, and that he never had offered to return it. Mr. Wallace, called as a witness for the defendant, testified on his cross examination: "The defendant found no fault with the machine at the time he gave the notes. I don't remember my saying anything about his keeping the machine another year when I took the notes. I supposed it was a sale, and the warranty fulfilled; that is the way I understood it when I took the notes. The reason why I did not get them sooner was that I could not find the defendant ready. He made no objection to giving the notes." The same witness, being called for the plaintiffs, tes-

Harrison, Judd & Co. vs. Crocker.

fied: "I asked defendant for the notes so that I could settle with the company, and he gave them to me. That is all the conversation we had."

There was some evidence tending to show that after the first note fell due the defendant promised to pay it, although he then complained of the machine.

For the plaintiffs, one Munden, who acted as their agent instead of Wallace in 1871, testified that in June of that year defendant applied to him for certain "extras" for the machine in question, and complained that he had had trouble with it, and it had frequently broken. "I told him I thought the pitman box was not screwed tight. If it was loose, the sickle eyes would break as fast as he could put them in. * * I saw the machine that year after harvest, in defendant's field, and found it in running order, except that the pitman box was loose. You could chuck it around so that it would break sickle eyes as fast as they were put in. That is all I discovered out of the way with it. * * Defendant complained of the sickle eyes breaking; he made no complaint about the rake, only about the sickle eyes. I said the cause of it was the pitman box being loose. * * I saw the machine. It could be put in order in ten minutes, and was worth as much as ever: \$200 and freight. * * If the boxes are kept tight, the sickle eyes are not liable to break. The nuts are liable to get loose, and want to be watched. * * I do not consider that the way I saw the machine, it would be running it with competent care and skill."

To rebut this evidence, the person who drove the machine the first season for defendant, testified that the nuts to the boxes were kept screwed up, and he took pains with it, and did as near what Mr. Wallace told him as he knew how. The person who ran the machine the second year, also testified that he "kept the boxes tight."

The plaintiffs requested the court to charge the jury as follows: "1. That a warranty that a machine will do good work

Harrison, Judd & Co. vs. Crocker.

is upon the condition that it shall be well operated and managed; and before the jury can find that this machine did not do good work, they must find that it was well operated and managed. 2. That if any defect existed in the machine after the sale, which defendant claimed was a breach of the warranty or representations made at the time of sale, it was defendant's duty to inform the plaintiffs of their existence at the time of giving the notes; and if defendant gave the notes without claiming any deductions from the contract price on account of them, or making any new contract respecting the machine, then the giving of the notes was a waiver of the warranty or fraud, if any, and the jury must find for the plaintiff for the amount of the notes and interest." The court refused so to charge. Certain instructions given to the jury as to the presumption that defendant had operated the machine with ordinary care and skill, are sufficiently stated in the second paragraph of the opinion, *infra*.

The jury found that plaintiffs had no cause of action; a new trial was denied; and plaintiffs appealed from a judgment on the verdict.

The case was submitted by both sides on briefs.

A. Meggett, for appellants, contended, among other things, 1. That there is no presumption that defendant operated the machine with ordinary care and skill, or that he employed suitable persons to operate it; and he should have made proof of the fact at the trial. *Chamberlain v. Railway Co.*, 7 Wis., 431; *Lehman v. City of Brooklyn*, 29 Barb., 236; *Ford v. Simmons*, 13 La. Ann., 397; *Great Western R'y Co. v. Bacon*, 30 Ill., 347. 2. That in view of defendant's giving the notes after a trial of the reaper for a whole season, without condition or complaint about the machine, and his subsequent promise to pay, the second instruction asked by plaintiffs should have been given. *Boothby v. Scales*, 27 Wis., 638; *Booth v. Ryan*, 31 id., 45; *Reed v. Randall*, 29 N. Y., 362, 363; *Gaylord Man. Co. v. Allen*, 53 id., 519; *Cassidy v. Le-*

Harrison, Judd & Co. vs. Crocker.

fevre, 57 Barb., 313. 3. That the evidence was not such as to warrant the finding of the jury.

John Frazer and *Bundy & Manwaring*, for respondent:

1. After an executed sale of the machine to him with express warranty, the subsequent giving of notes by defendant for the price was not necessarily a waiver of the terms of the warranty. The property vested in him from the delivery; and he could retain it and sue on his warranty without notice. *Getty v. Rountree*, 2 Pin., 379. In fact this was his only remedy. Sedgw. on Dam., 287. The giving of the notes could therefore make no difference in the rights of the parties (*Chitty on Con.*, 407, note 1); though it might be some evidence that the terms of the warranty were complied with, and sufficient to call for explanation on defendant's part. In this case the reason why the notes were given are fully explained.

2. Ordinary care and diligence are always presumed, until the contrary appears. Men are presumed to act for their own interest, and to use ordinary care and diligence in prosecuting their business. *Shearm. & Redf. on Neg.*, §§ 43, 44, and cases there cited. *M. & C. R. R. Co. v. Hunter*, 11 Wis., 160.

COLE, J. One of the errors relied on for a reversal of the order was the refusal of the court to give the two instructions asked on the part of the plaintiffs. These requests seem to have been asked as one charge; or, at all events, there is only one exception to the refusal of the court to give them. This exception will not enable this court to review the correctness of any single instruction. The only question arising on the exception is, whether both requests, when considered as an entire charge or instruction, were correct as a proposition of law. *Strachan v. Muzlow*, 31 Wis., 207, and cases cited. The second instruction asked, as it seems to us, is clearly incorrect. The giving of the notes, under the circumstances disclosed in the evidence, without claiming a deduction from the contract price of the machine for the alleged

breach of warranty, did not *per se* amount to a waiver of the warranty. The execution of the notes some time after the purchase of the machine, and after the defendant had had an opportunity to try it, might be a circumstance tending to show that the defendant was satisfied with the machine; though even for that purpose it would be entitled to but little weight or importance.

At the request of the defendant, the court charged that if the plaintiffs rely upon any carelessness or unskillfulness on his part in managing the machine, they must prove it, the presumption being that the machine was operated with ordinary care and skill; and, unless the contrary was shown, the jury must assume such to be the fact. This charge was excepted to by the plaintiffs. Also in the general charge the court instructed the jury, that, as to the mode of operating the machine, the law required that ordinary care and skill should be used in testing its merits in order to ascertain if it was such a machine as promised; and that, in the absence of testimony to the contrary, the presumption would be that ordinary care and skill were used in the operation of the machine. This charge was likewise excepted to by the plaintiffs.

What would be the true rule in regard to the burden of proof where no evidence whatever was given as to the manner of operating the machine, is a question we need not determine. It will be seen that the court held that in such a case the presumption would be that the machine was operated with ordinary care and skill, and that it was incumbent upon the plaintiffs to show that it was not so used. The warranty that the machine would do good work was doubtless upon the condition that reasonable skill and care would be used in operating it; and this must be assumed to be the understanding of the parties to the contract. The defendant on the trial attempted to show, as a part of his case, that the machine did not answer the warranty, and did not do good work, although

Harrison, Judd & Co. vs. Crocker.

reasonable skill and care were exercised in operating it. This evidence was controverted on the part of the plaintiffs, who attempted to prove that the defendant did not use ordinary skill in operating the machine. In this state of the evidence, there was no ground for a presumption either way, but the question should have been submitted to the jury to determine how the fact was. It was plainly a question of conflicting evidence. What presumption would arise in the absence of all evidence upon the question, was a matter not involved in the cause; and stating what the presumption would be in such case was well calculated to mislead the jury. The question should have been submitted upon the conflicting evidence given, for the jury to determine whether the machine was used with ordinary care and skill or not. There was certainly evidence to carry the case to the jury upon that point.

We will add the remark that we express no opinion as to which party was bound to show that the machine was skillfully or unskillfully operated. That question is not here, and we therefore do not feel called upon to consider it. But the instructions given on that point were well calculated to prejudice the plaintiffs, and for that reason a new trial is ordered.

The counsel for the defendant calls our attention to some discrepancies between the printed case and the original bill of exceptions. And in the printed case there are references to the original bill of exceptions. I have read the manuscript bill, and find some defects in the printed case. The rule requires the printed case to contain everything material and necessary for a proper understanding of the case and the points to be decided. It is expected that the bar will comply with the rule; otherwise it will be enforced against them.

By the Court.—The order of the circuit court denying the motion for a new trial is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

Oleson vs. Flom.

OLESON VS. FLOM.

Reversal of Judgment.

1. Where the complaint states a cause of action, and there was evidence tending to prove its material averments, the verdict will not be disturbed by this court, although there was a preponderance of evidence against it.
2. A judgment will not be reversed for inaccuracies in the instructions given, by which the appellant could not have been injured.

APPEAL from the Circuit Court for *Dane* County.

Action to recover damages for personal injuries. The complaint alleges that the plaintiff was a guest at defendant's hotel in Madison, and that while such guest, and on a day specified, "the said defendant, without any cause or provocation, unlawfully, rudely and violently seized hold of the person of this plaintiff, and then and there, with great force and violence, threw this plaintiff on the floor in a public bar room in said house, whereby and by which means this plaintiff's right leg was broken between the knee and ankle; and that said injury was caused as aforesaid without any fault or negligence on the part of this plaintiff."

In addition to the general denial, the answer contains the following defense: "That the injury of the plaintiff aforesaid was caused wholly by his own fault, and by his producing and bringing about a scuffle, in which, by accident, and without design or fault on the part of anybody but the plaintiff, he suffered the injury complained of."

On the trial, no instructions to the jury were asked on behalf of the defendant; but at plaintiff's request the jury were instructed, that if they were satisfied from the evidence that the plaintiff, upon the occasion of the alleged injury, did challenge persons to wrestle with him, nevertheless, if they were also satisfied that such challenge or offer to wrestle was unknown to the defendant, the fact of such challenge having been made was no excuse to the defendant in this action, if

Oleson vs. Flom.

the jury were also satisfied that the defendant "threw the plaintiff to the floor as charged in the complaint, and in so doing caused the breaking of his leg in manner and form and in the way as charged in the complaint;" and, that if they found the plaintiff was so injured, he was entitled to recover.

The judge then proceeded to state to the jury the positions of the respective parties, and stated that of the defendant as follows: "Upon the other hand it is claimed upon the part of the defendant, that the plaintiff took hold of him, requesting him to wrestle, and that they did so by mutual consent, if not expressed in words, by joining in and engaging in an entirely friendly manner; and that, while so engaged, and with no more force or unfairness on his part than usually attends such contests and exhibitions of strength, the plaintiff accidentally received the injury complained of, without fault on the defendant's part, or at least with no more fault upon his part contributing to the injury than there was upon the part of the plaintiff; in other words, that if there was anybody to blame, the plaintiff was as much at fault as he was."

No specific exception was taken to any portion of the charge, except those above quoted. Verdict for the plaintiff; a new trial denied, and judgment entered pursuant to the verdict; and the defendant appealed.

Wm. F. Vilas, for the appellant.

Wm. Welch, for the respondent.

LYON, J. 1. It is claimed on behalf of the defendant, that there is no evidence to support the verdict. This claim is not sustained by the record; for the bill of exceptions contains testimony tending to show that, although the plaintiff had challenged others to wrestle with him immediately before he was injured, he did not so challenge the defendant, and that the defendant seized and suddenly threw him, and thus caused the injuries complained of. In other words, the testimony

tends to prove the material allegations of the complaint. Such being the case, the rule is settled that we cannot disturb the judgment, even though there may be a preponderance of evidence against the verdict.

2. The instruction given at the request of the plaintiff seems to have been framed on the hypothesis that there was testimony tending to show that the defendant did not hear the plaintiff challenge others to wrestle with him. We find no such testimony in the bill of exceptions, and the instruction in that particular is probably inaccurate. But the plain purport and meaning of the whole instruction is, that if the material allegations of the complaint are true, the plaintiff is entitled to recover; and so the jurors must have understood it, if they were men of ordinary intelligence. But if the instruction is to be construed critically and literally, it is most favorable to the defendant; for the inference which may be drawn from its language is, that if the plaintiff's challenge to others was known to the defendant, such challenge is an excuse to the defendant for seizing and throwing the plaintiff,—the instruction being that the challenge was *no* excuse if *unknown* to the defendant. But, of course, the learned circuit judge intended nothing of the kind when he gave the instruction. This is apparent from the qualification contained in the latter part of it: "if the jury are also satisfied * * that the defendant threw the plaintiff to the floor *as charged in the complaint*," that is to say, if he, "without any cause or provocation, unlawfully, rudely and violently seized hold of the person of the plaintiff, and * * with great force and violence threw him on the floor," and injured him, the defendant is liable for such injury. The whole difficulty in the instruction seems to be that the word "*unknown*" is used therein, when the words "*not given*" should have been used instead. As we understand the instruction, however, it is quite immaterial whether the defendant did or did not hear the plaintiff's challenge to others; for in either case, if the

plaintiff was injured "as charged in the complaint," he is entitled to recover. Hence the inaccuracy complained of is not sufficient to reverse the judgment.

3. In the other portion of his charge to which specific exception was taken, we do not understand that the judge stated or attempted to state any rule of law. But if such statement implies (as counsel claim) a proposition of law, we think it is not materially inaccurate. The judge told the jury, in substance, that the defendant claimed he was not liable to respond in damages for the alleged injury, if the plaintiff challenged him to wrestle, or if, without express challenge, they mutually engaged in a friendly contest, and the injury was inflicted without any unfairness on the part of the defendant. The remainder of the statement is to the effect that the defendant claims a further restriction upon his liability, that is, "if anybody was to blame, the plaintiff was as much at fault as he was." Now, had the court instructed the jury that the plaintiff could recover if the defendant was most to blame for the injury, under the facts of the case we do not think it would have been error. The only fault imputed to the defendant is, that he seized the plaintiff and threw him, thus causing the injury, without such challenge or mutual engagement; while the only fault imputed to the plaintiff is, that he gave the challenge, or mutually engaged with the defendant in such contest. Hence there is no balancing of fault or negligence, and such supposed instruction would amount only to this: If the plaintiff challenged the defendant, or if they mutually engaged in a friendly contest of strength, the plaintiff's fault or negligence alone caused the injury, and he cannot recover; otherwise he may recover. And this, we think, is the issue made by the pleadings and evidence.

By the Court.—The judgment of the circuit court is affirmed.

Hall vs. The State.

HALL VS. THE STATE.

CONSTITUTIONAL LAW. *Geological commissioners under act of 1857, public officers; their contract with the state terminated by unconditional repeal of the act.*

1. Where a legislative act creates a public office, appoints the officer, and appropriates money to pay his salary, a subsequent repeal of the act terminates both the office and the right of the appointee to any salary not already earned at the time of such repeal.
2. The repeal of such an act does not impair the obligation of contracts within the meaning of subd. 1, sec. 10, art. I of the federal constitution.
3. The commissioners appointed by ch. 40 of 1857, to make a geological survey of the state, were public officers; and their offices were abolished by the subsequent unconditional repeal of the act, notwithstanding the contracts entered into with them by the governor in behalf of the state; and plaintiff cannot recover any salary for services alleged to have been rendered under the contract with him since such repeal.

The action was commenced in this court, to recover for alleged services of the plaintiff, as a commissioner of the geological survey of the state, from March, 1862, to March, 1863. The plaintiff was appointed such commissioner by ch. 40, Laws of 1857; and in March, 1858, the governor entered into a contract with him as prescribed in said act, to continue in force five years. The plaintiff received the salary fixed in the contract until March, 1862, at which time the act of 1857 was unconditionally repealed. The legislature refused to pay the claim. The foregoing facts are stated in the complaint.

The attorney general demurred to the complaint, on the grounds: 1. That it fails to state a cause of action; and, 2. That the statute of limitations has run against the plaintiff's demand.*

* Ch. 40, Laws of 1857, appoints "James Hall, of Albany, N. Y., and Ezra S. Carr and Edward Daniels, of Wisconsin, commissioners to make a geological, mineralogical and agricultural survey of the state" (sec. 1); provides that "said commissioners shall arrange and distribute the functions of such

Hall vs. The State.

The Attorney General, for the state:

1. Ch. 40, Laws of 1857, gives the governor no authority to contract *under seal*; nor does it fix the *time* for which the commissioners shall serve. The expression "extent of the service" refers to the territorial limits to be assigned to each, or perhaps to the amount of labor to be performed by each; certainly not to the period of time during which the services were to be performed. The act of an agent or an attorney under an express power must be within the letter or scope of the power, to bind the principal. Story on Agency, § 165, and cases there cited; *Hanford v. McNair*, 2 Wend., 286; *North River Bank v. Aymar*, 3 Hill, 262; *Orton v. The State*, 12 Wis., 509; *Randall v. The State*, 16 id., 340; *Gee v. Bolton*, 17 id., 604; *Mayor, etc., v. State Bank*, 3 Ark., 227; *Nixen v. Hyserott*, 5 Johns., 58. An authority granted by the legis-

survey by mutual agreement" (sec. 2); directs the governor of this state to "make a written contract with each of the commissioners, expressly stipulating and setting forth the nature and extent of the service to be rendered by each, and the compensation therefor, including the expenses of the department of the survey under charge of each commissioner," and that "such contract shall expressly provide that the compensation to such commissioner shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of \$2,000 per annum, and that payment will be made only for such part of the year as such commissioner may be actually engaged in the discharge of his duty as such." It further provides that in case of a vacancy occurring in the commission, the governor shall appoint some suitable person to fill it, and that he may remove any member for incompetency or neglect of duty, after due notice, etc. (sec. 5); and "to carry out the provisions" of the act, it appropriates "\$6,000 per annum for the term of six years."

The contract entered into with the plaintiff, as set forth in the complaint, purports to be made by "Alexander W. Randall, governor of the state of Wisconsin, on behalf of said state, of the one part," etc., and, besides the signature and seal of the plaintiff, has the following signature: "ALEXANDER W. RANDALL, Gov. of Wis., for State of Wis.," with his private seal attached. It recites that in pursuance of said act said commissioners have arranged and distributed the functions of said survey by mutual agreement; that said *Hall*, under such arrangement and distribution, thereby agrees and binds himself, as such commissioner, to do certain specified portions of the

Hall vs. The State.

lature to an agent to enter into a contract must be construed to mean a simple contract, and not a sealed one. *State v. Allis*, 18 Ark., 269. Ch. 334 of 1860 does not ratify the contract. 2. If the governor had authority to make this contract under seal, it is not well executed under his private seal, so as to bind the state. Constitution of Wis., art. XIII, sec. 4; Tay. Stats., 264, sec. 20, subd. 2. An action on the contract, however, might lie in *assumpsit*. *Randall v. Van Vechten*, 19 Johns., 60; *Damon v. Granby*, 2 Pick., 345; *Mitchell v. St. Andrew Bay*, 4 Fla., 200; *F. & M. Turnpike Co. v. McCullough*, 25 Pa. St., 303; *State v. Allis, supra*; *Regents, etc., v. Detroit Y. M. Society*, 12 Mich., 138, 155; *Bank v. Guttschlick*, 14 Pet., 19; and especially *Baxter v. The State*, 15 Wis., 489. 3. The contract was terminated by a repeal of

work required by the act, and to devote his time and attention to the duties of his department; and that this contract is "to continue until the third day of March, 1863, unless the said Hall shall be removed for incompetency or neglect of duty, * * * or unless a vacancy shall occur in his office by his own act or default." It also contains an agreement on the part of the state to pay said Hall for his compensation and expenses at the rate of \$2,000 per annum, with deduction *pro rata* for such time as he or his assistants shall not be engaged in the prosecution of his duties. Ch. 334, Laws of 1860, constituted and appointed the plaintiff "principal of the geological commission," established by ch. 40 of 1857, and vested in him "such general control and supervision of the geological survey of the state as is not already expressly reserved to the several commissioners designated in said chapter" (sec. 1); required him to enter into certain written contracts with J. D. Whitney and Charles Whittlesey, for the completion of certain surveys and maps (sec. 2); and for the purpose of carrying into effect the provisions of the second section, authorized the governor, upon presentation of the proper vouchers, to draw from the treasury such portion of the sum appropriated by said ch. 40 of 1857, as was not drawn previous to the signing of the contracts with the commissioners on the 29th of May, 1858, and provided that all that part of the said appropriation which should not be required to carry into effect the provisions of the contracts with Whitney and Whittlesey should be appropriated for the engraving of maps and drawings to illustrate their surveys (sec. 3).

By the terms of ch. 116, Laws of 1862, ch. 40 of 1857, and ch. 334 of 1860, were unconditionally repealed.

the act. The plaintiff was a public officer, appointed by the act. His employment and his tenure of office were created and fixed by the act itself. The contract merely fixed his compensation, that being the only power delegated to the governor. He was not authorized to contract for any specific time—certainly not for a time beyond the existence of the law. A person holding an office created by the legislature, has no vested right in it; but the legislature may at any time destroy it. *State v. Douglas*, 26 Wis., 428; *State v. Von Baumbach*, 12 Wis., 310; *Conner v. Mayor*, 5 N. Y., 285; *People v. Comptroller*, 20 Wend., 595.

L. S. Dixon and *D. S. Wegg*, for the plaintiff:

1. Where an office is created by statute, the legislature may change at pleasure the term, the mode of appointment and the compensation; and the officer may resign whenever he sees fit; because there is no contract between him and the government. The plaintiff is not a public officer within these principles, but an employee of the defendant. The act of 1857 makes it the governor's duty to enter into a written contract with the commissioners, binding them to perform certain duties, and the state to pay them a certain sum, therein specified; and sec. 6 prescribes the time for which the contract should continue. If this contract had been made between private parties, each would clearly have an action for any breach thereof on the part of the other. The same rules apply to contracts between the state and an individual as to those between individuals only. *Sholes v. The State*, 2 Chand., 195, 197-8; *Metzel v. The State*, 16 Wis., 350; *McComb v. Board of Liquidation*, Chicago Legal News, April 24, 1875, and cases there cited. The repealing act of 1862 impairs the obligation of the contract, and is void. 2. The general rule is, that when a deed is executed or a contract made *on behalf of the state* by a public officer duly authorized, and this fact appears upon the face of the instrument, it is the deed or contract of the state, although the officer may be described therein

Hall vs. The State.

as one of the parties, and may have affixed only his individual name and seal. This rule is founded upon public policy. It would be impracticable to place the great seal of the United States upon all contracts entered into in its behalf in the various departments of public service. *Hodgson v. Dexter*, 1 Cranch, 109; *Unwin v. Wolseley*, 1 Term, 674; *State v. McCaully*, 15 Cal., 429, 456; *Stinchfield v. Little*, 1 Greenl., 234; *Daves v. Jackson*, 9 Mass., 490. Again, it is not essential that the common seal be used even in cases of private corporations; any other may be, if it appears that such use has been adopted or ratified, and very slight evidence has been held sufficient for this purpose. *Bank v. R. R. Co.*, 30 Vt., 159, 160, 172; *Tenney v. Lumber Co.*, 43 N. H., 343, 354-5; *Mill Dam v. Hovey*, 21 Pick., 417; *Porter v. R. R. Co.*, 37 Me., 349; *Phillips v. Coffee*, 17 Ill., 154. 3. The legislature directly recognizes the contract in question by sec. 3, ch. 334, Laws of 1860, and must be considered to have ratified it, and to have adopted the seal affixed to it. It would be unjust to construe this act otherwise, considering the unconscionable nature of the defense. Plaintiff is entitled to judgment under this view of the case, even if the court adheres to its decision in *Baxter v. The State*, 15 Wis., 489.

LYON, J. Several questions were ably argued at the bar, but the one which underlies all the others is: Did the repeal of the act of 1857 (ch. 40), providing for a geological and agricultural survey of the state, terminate the salaries of the commissioners thereby appointed? If the commissioners were public officers, there can be no doubt that the repeal of the act appointing them, and appropriating money to pay them, terminated both the office and the right to the salaries which pertained to the office. In such case the repeal of the act of 1857 does not impair the obligation of contracts within the meaning of the constitution of the United States, which ordains that no state shall pass any law impairing the obligation

Hall vs. The State.

of contracts. Art. I, sec. X, pl. 1. It was so held in the *Dartmouth College Case*, 4 Wheat., 627 to 630, and is the settled law.

It may as well be remarked here as elsewhere, that the fact that the law of 1857 provides for the making of a formal contract is not considered important or very significant. Every public officer who is required by law to execute, and who does execute, a bond conditioned generally or specifically for the faithful discharge of the duties of his office, is equally under contract and equally sustains a contract relation to the state; yet, unless prohibited by the constitution, there is no doubt of the power of the legislature to abolish the offices and terminate the salaries pertaining thereto. The object of requiring the commissioners to enter into a contract with the governor seems to have been to enable the latter to fix the specific salary to which each commissioner should be entitled, and to prescribe the specific service which should be rendered by each. Had the legislature fixed the salary and prescribed the service in the act itself, omitting entirely the contract clause, the case would have been the same in principle.

The question recurs, therefore, Were the commissioners public officers? When the law of 1857 was enacted, the state was comparatively new. It was known to contain immense agricultural and mineral resources, but the extent and value of these, in large portions of the state, were not accurately known. It was then (as it now is) the policy of the state to encourage settlement and the investment of capital therein. To this end it was essential that authentic information concerning the resources of the state should be collected and disseminated. The act of 1857 appointed commissioners (of which the plaintiff was one), to collect such information; and other legislation provided for the appointment or election of still other commissioners to disseminate abroad the information thus collected. Of course, allusion is here made to commissioners of immigration.

Hall vs. The State.

The geological survey commissioners were appointed directly by the legislature; no specific term of office was fixed (except by the governor, whose power to do so may well be doubted); provision was made by law for removing them for cause, and for filling vacancies; their salaries were paid out of the state treasury; and their functions were not of merely private, local or temporary concern, but related to the material and permanent interests of the whole state. The duty imposed upon them was an important public trust, to be exercised for the benefit of all the people of the state, and could only be discharged properly by gentlemen of high attainments in physical science.

With this brief statement of the objects of the law of 1857, and the nature of the duties imposed upon the commissioners, we are ready to consider the legal principles which must control the determination of the question under consideration.

It may safely be asserted that any person charged by law with the performance of public functions affecting the general interests of society, especially if he be elected thereto by the people, or appointed directly by the legislature, and who receives his compensation out of the public treasury, is a public officer, and as such can have no vested right in his office, unless secured by the constitution. There is a class of cases which give a more strict construction to the term *office*, as used in constitutional clauses providing by whom certain officers shall be appointed, and restricting eligibility to office. *United States ex rel. Noyes v. Hatch*, 1 Pinney, 182, and several Pennsylvania cases there cited, belong to that class.

But for obvious reasons we think that no such limited construction should be given to the term in the present case. The legislation of a state affecting its material interests, if wise, will be adjusted to and governed by the ever changing circumstances of the people. As new interests arise they will be properly cared for, and all interests will receive the fostering care of the legislature within the limits of legitimate

Hall vs. The State.

legislative action. To accomplish this it is essential that the legislature should be free to act as the exigencies of particular circumstances may require, untrammelled by vested rights under previous enactments. If it is in the power of one legislature to create offices involving contract relations, for long terms and with large salaries attached thereto, and to give the incumbents a vested right to the offices and salaries, subsequent legislatures might not be thus free to act as the public good should require. We believe that one legislature has no power thus to tie the hands of a subsequent legislature; and that to hold otherwise would be to introduce a new, unsound and most dangerous principle into the jurisprudence of our state; one which would almost necessarily result in great evil to the state.

It may be entirely proper to adopt the strict rule of construction in cases which concern eligibility or the right to make appointments to public office; but in a case like this, where the question concerns the power of the legislature to abolish the office and terminate the salary, we think the more liberal construction should prevail. It is not conceded, however, that, were the strict rules adopted, the result in this case would be different. We are strongly inclined to think it would not.

It may be difficult to draw the exact line between an *office* and a mere *service* or *employment*; but, as already observed, when public functions are conferred by law upon certain persons elected by the people or appointed by the legislature, if those functions concern the general interests of the state, and are not of a nature merely local or temporary, such persons are public officers, especially if they are paid a salary for their services out of the public treasury; but an officer may be authorized to contract with and employ other persons to render service in his department (as clerks, messengers, agents, and the like), who would not be public officers. I suppose there is no doubt that the regents of the university are officers, but

 Johnson vs. The Northwestern National Insurance Company.

it was held in *Butler v. The Regents, etc.*, 32 Wis., 124, that a professor in the state university appointed by the regents, is not a public officer in any sense that excludes the existence of a contract relation between himself and the board that employs him. His relation to the board was likened to that of the teacher of any public school to the district by whom he is employed, which beyond all question is purely a contract relation. Many other illustrations will readily suggest themselves to the mind.

Without attempting to lay down any rule by which the line between an office and a mere employment can always be found, we think it must be held that the plaintiff was a public officer in such sense that he could have no vested right in his office, and hence that the office and the salary pertaining thereto were abolished by the repealing act of 1862. Having reached this conclusion, we are relieved from considering the other questions argued by the learned counsel.

It follows that the demurrer to the complaint must be sustained.

By the Court. — Demurrer sustained.

 JOHNSON VS. NORTHWESTERN NATIONAL INSURANCE COMPANY.

MARINE INSURANCE. (1, 2) *Construction of phrase, "Loading offshore prohibited," in marine policy.* (5) *Rule of construction.*

EVIDENCE. (3, 4) *Extent to which parol evidence admissible to explain a policy of marine insurance.*

1. The words, "Loading offshore prohibited," in a policy of marine insurance, are capable of being construed by the court without the aid of extrinsic evidence; and where the plaintiff puts such a policy in evidence in an action thereon, without extrinsic evidence of its meaning, there is no error in denying a nonsuit on that ground.
2. In the absence of extrinsic evidence, this court would construe such words

Johnson vs. The Northwestern National Insurance Company.

as merely intended to prohibit loading while the vessel was lying at anchor away from the shore, and not to prohibit loading at a bridge pier.

3. In an action on such a policy, parol evidence of experts is admissible to show that the words "loading offshore" have acquired a certain definite and notorious meaning among nautical men, and that they include loading at a bridge pier.
4. If adopted by the underwriter in a nautical sense, such words will be presumed to have been taken with their known signification in maritime matters, and the testimony as to their meaning cannot be confined to their use in policies of insurance.
5. To instruct the jury that if the term "offshore" may be understood in more senses than one, it is to be interpreted "in the sense in which defendant had reason to suppose plaintiff understood it," would be error.

APPEAL from the County Court of *Milwaukee* County.

Action on a policy of marine insurance. Verdict for the plaintiff, and judgment thereon, from which the defendant appealed.

The facts sufficiently appear in the opinion.

L. S. Dixon, for appellant, among other points, argued,

1. That the motion for a nonsuit should have been granted, because, if the words used in the policy were of doubtful meaning, so as to make parol evidence admissible to explain them, it was incumbent upon the party offering the instrument to produce such evidence, that it might be known what, if any, his rights were; and if the words are capable of construction without the aid of extrinsic evidence, then, taken in their primary grammatical sense, they would include in their prohibition the loading of a vessel at the end of a bridge pier, fifteen hundred feet from shore.
2. That in the absence of any evidence that defendant had knowledge or information of the interpretation claimed and put upon the policy by plaintiff, it was error to instruct the jury that "if the phrase might be understood in more senses than one, it was to be interpreted in the sense in which the defendant had reason to suppose the plaintiff understood it."
3. That the question in the case was as to the meaning of the words "loading offshore" in an insurance policy, and not as to their meaning in a charter party

Johnson vs. The Northwestern National Insurance Company.

or other maritime contract, and the testimony should have been confined to that issue. *Coit v. Ins. Co.*, 7 Johns., 385; *Cobb v. Ins. Co.*, 58 Me., 326; 1 Pars. M. Ins., 83; *Smith v. Wilson*, 3 Barn. & Ad., 728; *Hinton v. Locke*, 5 Hill, 437.

James G. Jenkins, for respondent :

1. The phrase "loading offshore" having no known legal signification, it was essential that its meaning should be resolved in the light of known usage; and the question was for the jury, to be determined upon the evidence. *Am. Ins. Co. v. Bryan*, 26 Wend., 581; *Sleght v. Rhinelander*, 2 Johns., 531; *Coit v. Ins. Co.*, 7 id., 385; *Dow v. Whetten*, 8 Wend., 160; *Ganson v. Madigan*, 15 Wis., 144; 2 Parsons on Con., 67; Phillips on Ins., pl. 142-4, 1943; *Eaton v. Smith*, 20 Pick., 150; *Ex parte Hall*, 1 id., 262. 2. In case of a loss the underwriter is *prima facie* responsible, and the burden of proof is with him to show that it is not within the terms of the policy. *Williams v. East India Co.*, 3 East, 192; *Am. Ins. Co. v. Bryan*, *supra*. 3. Ambiguous or doubtful terms are to be taken most strongly against the person using them. Metcalf on Con., 312. 4. Underwriters using technical words in their policies, are bound to know the technical meaning of the terms used, and are liable according to that meaning. 1 Phillips on Ins., ch. 1, § 13; *Astor v. Ins. Co.*, 7 Cow., 202; *Noble v. Kennoway*, Doug., 511. Having adopted a nautical term into its policy, the defendant must be held to have taken it with the known signification attached to it in maritime matters, and cannot give to it a different signification.

COLE, J. This is an action on a marine policy of insurance issued by the defendant upon a schooner, the property of the plaintiff. The vessel was lost while taking in a load of wood at a bridge pier near Bayley's Harbor on the west shore of Lake Michigan. The policy had printed on the margin the words, "Loading offshore prohibited." The important question in the case is in regard to the meaning of these words in the

Johnson vs. The Northwestern National Insurance Company.

policy, and as to whether they did or did not prohibit loading at a bridge pier.

The plaintiff introduced the policy in evidence, proved the time and circumstance attending the loss of the vessel, and then rested, without offering any proof, or making any explanation, of the meaning of the prohibitory clause, or to what act it applied. The defendant moved for a nonsuit, which was overruled. The first exception relied on for a reversal of the judgment is the one taken to this ruling of the court refusing to grant the nonsuit.

On this point the learned counsel for the defendant assumes, as the basis of his argument, that the words in question are of doubtful signification, so much so that it was impossible for the court, looking on the face of the instrument, to ascertain their sense and meaning, and give them application; and consequently that parol evidence was necessary to render them intelligible. This being the case, it is insisted that it was incumbent on the plaintiff, offering the policy in evidence and seeking to recover upon it, to show what the words meant, and to establish the fact that they did not include loading at a bridge pier.

There would certainly be conclusive force in this reasoning if the assumption were sound that the phrase "loading off-shore" was so obscure or unintelligible that the court, without the aid of extrinsic evidence, was unable to give it any meaning or place any rational construction upon it as used in the contract; but such, it seems to us, is not the case. On the contrary, it is possible to construe the language and give the words an interpretation, without any explanation or aid from parol testimony. And, giving to the language used its common and apparent meaning, we should say that the clause in question was only intended to prohibit loading at a distance from and away from the shore while the vessel was lying at anchor, and that it did not include loading at a bridge pier. A bridge pier is really a projecting wharf, is a permanent

Johnson vs. The Northwestern National Insurance Company.

structure attached to and firmly connected with the main land; and loading from such a place one would naturally suppose was like taking in a cargo from shore. If the words are not used in a nautical sense in the contract, and have not a technical meaning, this is the construction we should place upon them. Certainly the words are not so obscure or ambiguous that they are unintelligible without the aid of parol testimony. We should not understand — in the absence of all testimony that custom or usage in marine contracts had attached to them a different meaning — that they did include or were intended to be applied to the case of loading at a bridge pier. It may be true, as claimed by defendant's counsel, that in a certain sense loading at the end of a bridge pier fifteen hundred feet long is loading "offshore," or away from and distant from the main land; but it is apparent that it is loading under quite different conditions from a vessel taking in a cargo from rafts and barges while anchored offshore, which manner of loading we think the company intended to and did in fact prohibit. So that we are unable to agree with counsel in the position, that the words in the policy are of such doubtful import that it was impossible for the court, in reading the instrument, to discover their meaning, or give them proper application. Nor do we think it correct to say that in their natural, ordinary sense they do include loading at a bridge pier, so as to make it necessary for the plaintiff in the first instance to explain the words, and to show by evidence that the loss did not come within the prohibitory clause. *Prima facie* the company was liable for the loss, unless it was made to appear that by custom or usage the words in a nautical or technical sense did include loading at a bridge pier, and that such a meaning must be given them in the policy.

It was claimed on the part of the defendant, that, by well established custom or usage, the phrase "loading offshore," when used in maritime contracts, more especially when inserted in a marine policy of insurance, included any manner of

loading outside a harbor, and included taking a cargo from a bridge pier, as well as from scows and rafts while the vessel was at anchor; and that the words must be understood in that sense in this contract. And, in support of that construction, several witnesses, seafaring men, were examined on the trial as to the meaning of the term "loading offshore" in nautical language and as used and understood by seamen and persons engaged in the navigation of the lakes. And these witnesses testified that the words meant loading from a pier, or scow or raft, or, in other words, loading outside a harbor. But on the other hand the plaintiff produced a still greater number of witnesses, seafaring men, who testified to the general understanding of the term among seamen, and that in a nautical sense it did not include loading from a bridge pier. The testimony is quite strong that in contracts of affreightment and charter parties the words do not apply to pier loading; but there is more doubt or conflict as to what is understood by them among insurers and vessel owners. In various ways the question is raised upon the record, to what extent parol evidence may be received to affect the construction of the policy and give a meaning to the words in question. The counsel for the defendant contends that no evidence relating to the meaning of the doubtful words was admissible except what tended to show their signification as used in policies of insurance and between underwriters and insured. But the court below made no distinction between the use of the words in insurance policies and other marine contracts, holding that the term was a nautical one, and that the jury must determine, from all the evidence bearing upon the subject, what "loading offshore" meant among nautical men and as used in the policy. We do not deem it necessary to comment at length upon the charge of the court, nor to specifically notice the exceptions taken to the refusal of the court to strike out certain testimony, and to other rulings made on the trial. Our views upon some of these exceptions will be gathered

from the remarks which will be made upon the case, and upon one portion of the charge which we deem erroneous and well calculated to mislead the jury to the prejudice of the defendant.

"It sometimes happens," says Prof. Parsons in his work on Marine Insurance (vol. 1, p. 77 et seq.), "that the words used have a peculiar commercial meaning, and then the reason of their use, or of any provision respecting them, may assist in ascertaining that meaning. Or they may be technical words of a trade or business; for there may be in this instrument [a marine policy] as in any other, words peculiar to a certain act or occupation. Such words occur most frequently in instruments respecting machinery and the like, but they may occur in any instrument, and wherever they occur, witnesses who are experts may be called to give their meaning." "Experts," he observes, "are very frequently called in insurance cases, but generally in relation to the condition or character of the vessel, or other facts in the case. They may, however, be called in reference to the construction of a policy, if technical words, as we have already defined them, appear in it. * * * In the construction of all contracts it is indeed a rule which is founded on obvious justice and reason, that if words are used which are peculiar to the subject matter of that contract, and when so used have a meaning which is well, widely and long known, the parties must be presumed to have used those words with that meaning." p. 81. And the learned author cites in the notes to the text a great many authorities in support of the rule that, "where terms are used which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject matter."

Within this rule it was certainly competent and proper for the court to receive the testimony introduced on the trial for the purpose of ascertaining the true meaning of the particu-

Johnson vs. The Northwestern National Insurance Company.

lar words used in the policy. And the court was right in submitting to the jury the question, notwithstanding the ordinary sense which would be given to the words "loading offshore" as we have indicated, whether or not in nautical language and among nautical men they had acquired a certain, definite and notorious meaning, which prohibited loading at a bridge pier. If the jury determined that the phrase was a nautical one, and by usage and custom had such a meaning among nautical men, then they were directed to find for defendant. But if, on the contrary, they found that the words meant simply to prohibit loading at anchor, and not from bridge piers, then the court instructed that the plaintiff was entitled to recover. But the counsel for the defendant insists that the parol testimony should be confined to that which shows the meaning of the words in policies of insurance. It seems to us the testimony cannot be thus restricted. If the words have a clear, definite and well known meaning in maritime language, they must have that signification in all maritime contracts. It would be utterly inadmissible to show that the words had one meaning in a contract of affreightment, another in a charter party, and a still different meaning in a policy of insurance; or rather this would show that they really had no precise, well defined and notorious sense in nautical language. If the underwriter adopted the term as a nautical one, it must be presumed that he took it with the known signification attached to it in maritime matters. Upon these questions, therefore, we think the court properly instructed the jury as to the law of the case.

But the court further told the jury that if the phrase may be understood in more senses than one, it was to be interpreted in the sense in which the defendant had reason to suppose the plaintiff understood it. Under this instruction it is obvious the jury might have found that "loading offshore," in the sense in which nautical men would understand the term, prohibited loading off a pier, but that this was not the sense in

Johnson vs. The Northwestern National Insurance Company.

which the defendant had reason to suppose the plaintiff understood it, and therefore have rendered a verdict in his favor. In a nautical sense the meaning of the term might be well defined and widely known. But, from the size of the vessel and circumstances attending the issuing of the policy, the insurer might have reason to suppose the insured understood the clause in a wrong sense, and was mistaken as to its true meaning. In that case, was the insurer bound to make good the loss, though not fairly covered by the policy, because he failed to correct the mistake of the party with whom he was dealing? According to the instruction he was responsible. Prof. Parsons, in his work already cited, alludes to this question (p. 74), and suggests a doubt whether an answer to it which may be good in a moral point of view, expresses a principle from which a legal rule of construction can be extracted. He shows that the rule is derived from Dr. Paley, whose remarks on the subject, he observes, have been often quoted in legal as well as other works, to the effect "that that meaning is not always obligatory which the promiser actually held, because the promisee might not know that the promiser so meant; nor is it always the meaning which the promisee actually gave to the promise, because the promiser might not have intended the meaning, nor justified the promisee in so understanding it." And Paley adds that "the promise must therefore be obligatory in the sense in which the promiser believed that the promisee accepted his promise." Prof. Parsons thinks that this cannot be a safe and sufficient rule for legal construction, except with the qualification, "and the promiser used words which can be rationally construed as expressing the sense which the promisee attached to them." It seems to us the rule is only sound in law with such a material qualification.

In the case of *Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis., 534-539, Mr. Justice LYON, *arguendo*, refers approvingly to this rule, and thinks it might well be applied in the

Cleaver and others vs. Cleaver and others.

construction of policies of insurance; but the point was not really one upon which the judgment turned, and therefore cannot be considered as one definitely determined. The rule, as laid down by Paley, is doubtless sustained by the remarks of the judges who gave the opinions in *Potter v. The Ontario & Livingston Mut. Ins. Co.*, 5 Hill, 147-149; *Barlow v. Scott*, 24 N. Y., 40-42; and *Hoffman v. Aetna Ins. Co.*, 32 id., 405-413; but we do not think it has become a legal rule in the construction of contracts. "The question in this and other cases of construction of written instruments, is not what was the intention of the parties, but what is the meaning of the words they have used." DENMAN, C. J., in *Rickman v. Carstairs*, 5 B. & Ad., 651-663. But, without dwelling longer upon the case, we think there must be a new trial for the error in the charge above quoted.

By the Court.—The judgment of the county court is reversed, and a new trial ordered.

CLEAVER and others vs. CLEAVER and others.

WILL. (1, 2) *Lapse of devise or legacy to a wife, who dies before her husband, leaving issue surviving him.*

COSTS: (3) *On appeal from an order of distribution in probate.*

1. In sec. 29, ch. 97, R. S. (which provides that "when a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given"), the word "relation" includes only relations by consanguinity.
2. The testator's wife having died before him, a bequest made to her by the will lapsed, although she left issue which survived him.
3. On appeal to this court by the guardian of such infant issue, from a judgment of the circuit court (on appeal from an order of distribution made by the probate court) denying their right to such bequest, the costs of the appeal on both sides are ordered to be paid from the estate.

Cleaver and others vs. Cleaver and others.

APPEAL from the Circuit Court for *Milwaukee* County.

This case arises upon an order of distribution made by the county court of Milwaukee county, in the estate of William L. Cleaver. The testator was twice married, and had three children by his first wife, and three by his second; the latter being the appellants in this case, and the former the respondents.

By his will, made after his second marriage, the testator, after giving specific legacies to each of his children by his first wife, gave and bequeathed all the residue of his estate, real and personal, to his second wife.

The wife having died several months prior to her husband, leaving the appellants, her issue, surviving, the county court, in making distribution of the estate, decreed that the residue thereof did not pass under the will to her issue, but should be distributed equally among all the testator's children. This order was affirmed by the judgment of the circuit court, from which this appeal is taken.

Sec. 29, ch. 97, R. S. 1858, reads as follows: "When a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given by the will, in the same manner as the devisee or legatee would have done if he had survived the testator, unless a different disposition shall be made or directed by the will."

L. S. Dixon, for appellants, argued that the construction placed upon the statute by the county court would entirely frustrate the intention of the testator; that the word "relation," as universally understood in common conversation and ordinary usage, and as defined by lexicographers and writers upon the meaning and use of English words, includes connection by affinity or consanguinity (*Webster's Dic.*; *Crabb's English Syn.*; 1 *Black. Com.*, 434); that the statute should receive a liberal construction (*Paine v. Prentiss*, 5 *Met.*, 396;

VOL. XXXIX. — 7

 Cleaver and others vs. Cleaver and others.

Farrington v. Wilson, 29 Wis., 383); that the construction given to the word "relations" when used in connection with bequests in a will, is an arbitrary one, founded upon necessity, and resorted to for the purpose of avoiding the uncertainty which would attend such bequests if construed in a literal and extended sense (*McNeilledge v. Galbraith*, 8 Serg. & R., 43, 45; *Same v. Barclay*, 11 id., 103, 105; Redf. on Wills, Part II, 409; *Huling v. Fenner*, 9 R. I., 410; *Varrell v. Wendell*, 20 N. H., 431; *Raynor v. Mowbray*, 3 Bro. C. C., 234); that the reason of the rule or restriction ceases where, as in this case, the devisee or legatee is specifically named, and a construction according to ordinary usage can give rise to no difficulty or uncertainty whatsoever; that the decisions under a similar statute of Massachusetts follow those of the English courts, guided by the rule as to who would be distributees, under the laws of that country, in case of intestacy, and should govern only so far as their reasoning convinces; and that even if that rule is to be followed, and the term restricted to those who would take as distributees in case of intestacy, it would still include the wife, as she is entitled, under our statute, to an equal share with the children of an intestate. R. S., ch. 99, sec. 1, subd. 6; ch. 92, sec. 1, subd. 2; ch. 61, Laws of 1868; ch. 121, Laws of 1870; 2 Tay. Stats., 1170, § 1, subd. 2; *Tyler v. Tyler*, 19 Ill., 151.

James G. Jenkins, for respondents:

1. The legacy can be sustained only upon the theory that the wife is a relation of the husband within the intent of the statute. The word "relatives," in the construction of wills, is applied ordinarily to persons in the line of consanguinity, and not to connections by marriage; and in Massachusetts, from whose statute ours is copied, it has been expressly held that a wife is not a relation within the meaning of the statute. *Elmsley v. Young*, 2 Myl. & K., 82; *Cooper v. Denison*, 13 Sim., 290; *Davies v. Bailly*, 1 Ves. Sr., 84; *Maitland v. Adair*, 3 Ves. Jr., 231; *Harvey v. Harvey*, 5 Beav., 134;

 Cleaver and others vs. Cleaver and others.

Worsely v. Johnson, 3 Atkyns, 758; *Storer v. Wheatly's Ex'rs*, 1 Pa. St., 506; *Esty v. Clark*, 101 Mass., 36; *Kimball v. Story*, 108 id., 382; 2 Jarman on Wills, 45; 2 Williams on Ex'rs, 1004; Roper on Legacies (2d Am. ed.), 117; *Varrell v. Wendell*, 20 N. H., 432; *Dickens v. R. R. Co.*, 23 N. Y., 158; *Drake v. Gilmore*, 52 id., 389. 2. In the construction of this statute, the doctrine of *noscitur a sociis* may properly be applied, and this would restrict the term "other relations" to those standing in the order of child, as grandchild, etc., in the direct descending line, and proceeding from the body of the testator. Broom's Leg. Max., 451; *Morse v. Ins. Co.*, 30 Wis., 534; Potter's Dwarries, 184, 236, 292; *Chegaray v. Jenkins*, 3 Sandf., 413; *Chegaray v. The Mayor, etc.*, 13 N. Y., 229.

RYAN, C. J. The testator's wife having died before him, there is no doubt that his bequest to her lapsed (2 Redfield on Wills, 284), unless it comes within sec. 29, ch. 97, R. S. And the sole question in this case is, whether a wife is a relation of her husband within the meaning of the provision.

Relation, in this use, is a very indefinite word, which has often perplexed courts. In a broad sense, there are relations by affinity as well as by consanguinity;" Jacobs' Dic., "Consanguinity;" 1 Black., 434. And in this sense, we should find it difficult to concur in the position that a wife is not a relation of her husband. *Storer v. Wheatly's Ex'rs*, 1 Pa. St., 506. As great a jurist as GIBSON, C. J., suffered himself to say in that case: "A wife is not related to her husband in any respect. Of his connection with her family, she is the link or *commune vinculum*;" but so far is she from being connected with him as a relation, that her civil existence is melted into his, and they together form one person. A wife, therefore, is no more a relation or connection of her husband, than the husband is a relation or connection of himself." That seems carrying a theory of the common law *ad absurdum*; a paradox which would make the

Cleaver and others vs. Cleaver and others.

homicide of the wife by the husband appear to partake of the nature of suicide rather than of murder, and the adultery of the wife rather the husband's own offense than hers against him. But though the common law adopted the maxim *vir et uxor sunt unica persona, quia caro una et sanguis unus*, yet that was very much *cum sit vir caput mulieris* (Co. Lit., 112 a.), and was largely in regard of rights of property and action. For many purposes, the common law truly recognized two persons in marriage, distinct and bearing to each other the nearest of all human relations. Bacon's, Peterdorff's, Dane's Abr., "*Baron & Femme*." The startling position, shocking all human understanding, that the wife is not a relation of the husband, seems to have arisen from the language of Lord HARDWICKE in *Worsely v. Johnson*, 3 Atkyns, 758, which the chancellor rests on his previous decision in *Davies v. Baily*, 1 Vesey Sr., 84; forgetting that he had said in the latter case, decided on another point, "It cannot be said that there is no relation between the husband and wife; but the question is, whether there be such a relation as is here meant." And that is the precise question in the construction of the statute before us.

The section in question seems to have been taken in 1849 from Massachusetts. There does not appear to have been then any construction of it in that state. But the subsequent decisions of *Esty v. Clark*, 101 Mass., 36, and *Kimball v. Story*, 108 id., 382, though not binding upon us, ought to have great weight. And it is satisfactory that our own conclusion is the same.

The word, relation, was perhaps unfortunately used in the section, because it is in itself indefinite. But there had fortunately been a uniform line of decisions, extending through more than a century, before the section was adopted here, which confined the word used in bequests, to relations by blood, and made it virtually equivalent to kindred. *Brown v. Brown*, ruled by Lord MACCLESFIELD, and cited in *Thomas*

 Cleaver and others vs. Cleaver and others.

v. Hill, *infra*, and other cases, was perhaps the first case on the point, but we cannot find it reported. *Anonymous*, 1 P. Wms., 327; *Thomas v. Hill*, Cases Temp. Talbot, 251; *Harding v. Glyn*, 1 Atkyns, 469; *Att'y Gen. v. Burkland*, apparently not reported, but cited in *Goodinge v. Goodinge*, 1 Vesey Sr., 231, and in a note to *Edge v. Salisbury*, Ambler, 70; *Davies v. Baily*, 1 Vesey Sr., 84; *Worsely v. Johnson*, 3 Atkyns, 758; *Whithorne v. Harris*, 2 Vesey Sr., 527; *Isaac v. Defriez*, Ambler, 595; *Green v. Howard*, 1 Brown's C. C., 31; *Hands v. Hands*, apparently not reported, cited in *Philips v. Garth*, 3 Brown's C. C., 69, and in other cases; *Spring v. Biles*, 1 Term, 435; *Stamp v. Cooke*, 1 Cox, 234; *Raynor v. Mowbray*, 3 Brown's C. C., 234; *Maitland v. Adair*, 3 Vesey, 231; *Devisme v. Mellish*, 5 id., 529; *Jones v. Colbeck*, 8 id., 38; *Mahon v. Savage*, 1 Sch. & Lef., 111; *Crucys v. Colman*, 9 Vesey, 319; *Doe v. Over*, 1 Taunton, 263; *Pope v. Whitcombe*, 3 Merivale, 689; *Smith v. Campbell*, Cooper, 275; 19 Vesey, 400; *Wright v. Atkins*, Turner & R., 143; *McNeilledge v. Barclay*, 11 Serg. & R., 103; *Harvey v. Harvey*, 5 Beavan, 134; *Storer v. Wheatley's Ex.*, 1 Pa. St., 506; *Varrell v. Wendell*, 20 N. H., 431. See also Comyn's Dig., App., "Devise of personal property," 30, 31, 32; 2 Jarman, 45; 1 Roper's Leg., 117; 2 Williams' Ex., 957; 2 Redfield on Wills, 409. There are probably other cases to the same effect; but we have been unable to find any qualifying the effect of those cited, which were all prior to the passage of our statute. There are subsequent cases, English and American, besides those in Massachusetts, *supra*, to the same purpose, which we do not think it necessary to quote. Those cited all proceed upon the necessity of limiting the indefinite sense of the word, relations; limit it by the statute of distributions to kindred; and determine not only the degrees of relation, but the kind also, that is by consanguinity. Such an unbroken series of decisions for nearly a century and a half appears to us conclusive of the construction of the

Cleaver and others vs. Cleaver and others.

word, applied to wills, as used in the statute. R. S., ch. 5, sec. 1, subd. 1. They warrant us to apply the language of Lord THURLOW in *Raynor v. Mowbray*: "If it was a recent matter, there might be a doubt; but... when once a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance."

This view would control our construction; but there is another which appears also to be conclusive. The words of the statute are, "child or other relation." *Noscitur a sociis*. Child or other relation must signify child, or other relation of like character as a child; that is, other relation of the testator's blood. "When particular words are followed by general ones, the latter are to be held as applying to persons and things of the same kind as those which precede." Potter's Dwarrris, 236, 292; Broom's Leg. Max., 450; *Morse v. Ins. Co.*, 30 Wis., 534; *Att'y Gen. v. R. R. Companies*, 35 id., 425; *Chegaray v. Jenkins*, 3 Sandford, 409. In the latter case, the statute construed had the words "Incorporated Academy or other seminary of learning." And the court says: "The maxim *noscitur a sociis* appears to be applicable here, and to limit the exemption from taxation to such seminaries alone as are incorporated." We cannot doubt the effect of the word, other, in this statute, or the intention of the legislature to use the phrase, other relation, in the sense of kindred.

The law has always favored blood in the descent of estates. The particular provisions of our statutes in favor of the wife are personal to her, and tend rather to exclude than to include her in the term relations, as used in the section. *Green v. Howard*, *supra*. In saving bequests from lapsing by the death of the devisee or legatee before the testator, the legislative intention appears to have been to save them only to the kindred of the testator, to the issue of the devisee or legatee only when the issue is of the testator's blood as well as the devisee or legatee. Therefore the statute is so framed as to

Cleaver and others vs. Cleaver and others.

exclude bequests to a stranger or the wife, because the issue of the one could not, and the issue of the other might not, be of the testator's blood. When the wife's issue is the husband's also, it seems to have been presumed that the will itself would provide for them without necessity of statutory protection. But when the issue of the wife is not the issue of the husband, we can perceive no reason, in or out of the statute, for saving a personal bequest to her from lapsing, which would not apply, though with perhaps less force, to a personal bequest to a stranger.

In the present peculiar case, the rule seems to work a hardship; but we must apply the general principle. In such circumstances as these, the natural feeling of the elder children should afford that protection to the younger, which courts cannot give without violation of judicial rule. And we can say of this case, as the court of Pennsylvania said of another: "It is an unfortunate case, but the law is clear. The legacy lapsed by the death of the legatee in the life of the testator." The statute "does not reach the present case, and we are sorry for for it." *Dickinson v. Purvis*, 8 Serg. & R., 71.

By the Court. — The judgment of the court below is affirmed.

The following *addendum* by the chief justice, shows the disposition made of the question of costs.

RYAN, C. J. In passing on the main question involved in this appeal, we quite overlooked the minor question of costs. Our attention has since been called to the omission by the clerk. We cannot doubt that the appeal was taken in good faith, or indeed that the guardian of the infants was quite right in taking it. Under all the circumstances of the case, we think that the costs of the appeal, on both sides, should come from the estate. *Jackman Will Case*, 26 Wis., 364. Let the judgment be so entered.

Sherman vs. The Madison Mutual Insurance Company.

SHERMAN VS. THE MADISON MUTUAL INSURANCE COMPANY.

APPEAL. (1) *Intendment as to facts.* (2) *Conclusion of law treated as such, though contained in finding of facts.*

FIRE INSURANCE. (3) *Waiver of condition as to additional insurance.* (4) *Rule for adjustment of losses under non-concurrent policies.*

1. Where the bill of exceptions is not certified to contain all the evidence, the judge's finding of facts will be presumed correct, though not sustained by the proof preserved in the bill.
2. Where the findings of fact filed by the judge include a proposition which is really a conclusion of law, it must be treated as such, on appeal.
3. In an action on a fire insurance policy, which by its terms was to be void if the plaintiff should procure additional insurance without notifying the insurer and having the same indorsed on the policy, if it appears that additional insurance was obtained *at the time the policy was issued*, and was not thereafter increased, and that the insurer, through the agent, knew the fact at the time, and with such knowledge paid a portion of the loss, the policy must be treated as valid.
4. Each of three policies of insurance upon the same live stock contained the provision that the company issuing it should be liable only for such a proportion of any loss as the amount insured by it should bear to the whole amount of insurance on the property. One policy insured the stock generally in the sum of \$1,500. Of the other two, each in the sum of \$1,666.67, one provided that no animal should be valued at more than \$500, and the other, that the insurer should pay no more than \$500 loss on any one animal. The insured lost by fire two steers valued at \$336, and one bull valued at \$2,000. *Held*, in an action on the \$1,500 policy,
 - (1) That plaintiff was entitled to recover from the three insurers *the whole amount of his loss*.
 - (2) That each of the insurers is liable to him for that proportion of the value of the two steers, which the whole amount insured by its policy bears to the whole amount insured by the three policies together.
 - (3) That as to the value of the bull lost, the liability of one of the other insurers being limited to \$500, while that of the second is limited to its proportion of \$500 as the stipulated value of the animal, defendant is liable for such additional sum as will make good the whole loss of \$2,000 upon the animal.
5. Whether the rule for the adjustment of losses in such cases may be proved by the testimony of experts, is not here decided.

APPEAL from the County Court of Dodge County.

Sherman vs. The Madison Mutual Insurance Company.

The defendant company issued three policies of insurance to the plaintiff, of five hundred dollars each, on his live stock. Each of these policies contained the following provision: "In all cases of other insurance upon the property, . . . in case of loss or damage by fire, the insured shall not be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured bears to the whole amount insured on said property." A loss having occurred, the defendant paid the plaintiff \$724.96 on account thereof, claiming that to be the extent of its liability. The plaintiff claimed that its liability exceeded that sum, and brought this action to recover such excess. The complaint is in the usual form of complaints on fire insurance policies. As defenses to the action, it is alleged in the answer, 1. That the policies contained covenants that they should be void if the plaintiff procured other insurance on the property and failed to give notice thereof to the defendant and have the same indorsed on the policies; and that the plaintiff obtained other insurance thereon, but failed to give such notice. 2. That if the policies are valid, there was other insurance on the property, and under the clause that in case of loss the defendant should be liable only for a proportionate share thereof, it has already paid its share of the loss in full.

The cause was tried by the court without a jury. Witnesses called by the plaintiff testified to computations, produced by them, of the amount of the defendant's liability on the policies in suit, and also testified as experts in respect to the rule for adjusting the loss.

The judge found the facts as follows: "1. That on the 9th of August, 1870, the defendant company issued to the plaintiff three several policies of insurance, as stated in the complaint. 2. That on the 17th of September, 1873, a fire occurred whereby two steers of the value of \$336, and one bull of the value of \$2,000, property of the plaintiff, were destroyed by fire in the barn upon plaintiff's farm. 3. That notice and

 Sherman vs. The Madison Mutual Insurance Company.

proof of loss were duly furnished to the defendant. 4. That the loss of the bull and steers, so destroyed by fire, was covered by the three policies above mentioned to the amount of \$1,500. 5. That the whole amount of loss sustained by the plaintiff, on said bull and steers, was \$2,336. 6. That at the time the defendant issued the policies above mentioned, plaintiff obtained other insurance upon the same property covered by defendant's policies, which fact was known and understood by defendant's agent; and that plaintiff has not increased such insurance since the date of defendant's policies. 7. That at the time of such loss the plaintiff had the defendant's three policies above mentioned, for \$500 each, on his live stock, in all \$1,500. 8. That he had also other insurance in the North Missouri Insurance Company, for the sum of \$1,666.67, on live stock, no one animal to be valued at more than \$500. 9. That he had also other insurance in the Continental Insurance Company, for the sum of \$1,666.67, on live stock, not to exceed \$500 on any one. 10. That the amount of such loss for which each of said insurance companies is liable under the said policies, is as follows:

	<i>On Steers.</i>	<i>On Bull.</i>	<i>Total.</i>
Continental, - - - - -	\$115 83	\$500 00	\$615 83
North Missouri, - - - - -	115 83	172 42	288 25
Madison Mutual, - - - - -	104 34	1,327 58	1,431 92
Totals, - - - - -	<u>\$336 00</u>	<u>\$2,000 00</u>	<u>\$2,336 00</u>

"11. That the amount for which the defendant company is liable on said loss is \$1,431.92. 12. That the defendant has paid the plaintiff on said loss the sum of \$724.96. 13. That there is now due the plaintiff from the defendant on said three several policies, the sum of \$706.96, with interest at seven per cent. from December 17, 1873, amounting to \$34.46, in all, \$741.32."

The conclusions of law were: "1. That the bull and steers destroyed by fire were covered by the defendant's policies, and

Sherman vs. The Madison Mutual Insurance Company.

that defendant is liable on said policies. 2. That the plaintiff is entitled to a judgment against the defendant for the sum of \$706.96, with \$34.46 interest from December 17, 1873."

The plaintiff had judgment accordingly; and the defendant appealed.

B. E. Hutchinson, for appellant:

1. The loss was adjusted and paid upon the plaintiff's assurance that the applications were all written at the same time, when the contrary was the fact; therefore, the objection as to other insurance is not waived. *Security Ins. Co. v. Fay*, 22 Mich., 467. 2. Breach of this condition avoided the policy, though the insurer had knowledge of the additional insurance, or the other policies were void. *Forbes v. Ins. Co.*, 9 Cush., 470; *Pendar v. Ins. Co.*, 12 id., 469; *Conway Tool Co. v. Ins. Co.*, id., 144; *Ramsay W. C. Manuf'g Co. v. Ins. Co.*, 11 Upper Canada Q. B., 516; *Ins. Co. v. Slockbower*, 26 Pa. St., 199; *Blanchard v. Ins. Co.*, 33 N. H., 9; *Mellen v. Ins. Co.*, 17 N. Y., 609; *David v. Ins. Co.*, 13 Iowa, 69; *Mitchell v. Ins. Co.*, 51 Pa. St., 402; *Lackey v. Ins. Co.*, 42 Ga., 456; *Carpenter v. Ins. Co.*, 16 Pet., 495. 3. The liability of the defendant, if the policies are held valid, is purely a question of law, and not of skill or science in such sense as to make the testimony of experts admissible.

S. U. Pinney, for respondent, argued that the question as to whether or not the policies were contemporaneous, was open to proof on the trial, and the finding of fact was conclusive (*Potter v. Ins. Co.*, 2 Mason, 475); that by payment and adjustment of the loss, with full knowledge of the facts, and claiming the benefit of the additional insurance, defendant had waived any objection founded thereon (*Hayward v. Ins. Co.*, 52 Mo., 181; *Security Ins. Co. v. Fay*, 22 Mich., 467); that the clause providing for adjustment of losses related only to concurrent insurance, to such as could be made to contribute to the loss in aid of the company in whose policy it was contained, and applied to the insurance of such underwriters

Sherman vs. The Madison Mutual Insurance Company.

as were sureties with it, and only to the amount to which they were cosureties. In support of the apportionment made in the court below, he cited *Blake v. Ins. Co.*, 12 Gray, 265; *Lycoming Ins. Co. v. Mitchell*, 48 Pa. St., 367; *Nichols v. Fayette Ins. Co.*, 1 Allen, 63; *Baltimore Fire Ins. Co. v. Loney*, 20 Md., 20; *Richmondville Seminary v. Ins. Co.*, 14 Gray, 459; *Lucas v. Ins. Co.*, 6 Cow., 635; *Bousefield v. Barnes*, 4 Campb., 229; *Minturn v. Ins. Co.*, 10 Johns., 75; *Angelrodt v. Ins. Co.*, 31 Mo., 593; and *Hoffman v. Ins. Co.*, 32 N. Y., 405. As to the admissibility of the testimony of experts, he cited *Angelrodt v. Ins. Co.*, 31 Mo., 593-8.

LYON, J. It is not certified that the bill of exceptions contains all of the testimony; hence it must be presumed that the findings of fact are sustained by the proofs, although the testimony preserved in the bill may be insufficient for that purpose. We have only to determine whether such findings support the judgment.

It is objected that the findings fail to show the liability of the defendant, because it does not appear therefrom that the plaintiff gave notice of the additional insurance as required by the terms of the policies in suit. But it appears from such findings that the additional insurance was obtained at the time those policies were issued, and was not thereafter increased; that the defendant (through its agent) knew the fact at the time; and that, having such knowledge, the defendant paid a portion of the plaintiff's loss. These are verities in the case; and we think they fully sustain the validity of the policies.

It only remains to determine whether the county court correctly adjusted the plaintiff's loss. The adjustment is contained in the tenth finding of fact, although such finding is substantially a conclusion of law, and must be treated as such.

The live stock destroyed exceeded in value the amount of the risk taken thereon by the defendant, and, but for the other insurance thereon, the defendant would be liable to pay the

Sherman vs. The Madison Mutual Insurance Company.

whole risk. The clause in the policies which reduces such liability, is as follows: "In all cases of other insurance upon the property, whether prior or subsequent to the date of this policy, in case of loss or damage by fire, the insured shall not be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured bears to the whole amount insured on said property." The clause itself furnishes the rule of adjustment in reasonably plain terms, and there should not be much difficulty in the application of the rule to particular cases. Where there are several risks upon the same property, given the amount of each and of the loss, it is an easy process to apportion the loss to the several risks.

It is said on behalf of the defendant, that the aggregate of insurance on the live stock was \$4,833 $\frac{1}{2}$ and the loss \$2,336; and that the amount of defendant's liability is a mere problem in proportion, which may be stated and solved thus: 4,833 $\frac{1}{2}$:1,500::2,336:725. This process makes the defendant liable only for the sum which it voluntarily paid before the action was commenced, and, if correct, defeats the action. But is it correct? The plaintiff is entitled to full indemnity for his loss; that is, he is entitled to receive from the three companies who insured his live stock, \$2,336. That is a right which he has paid for, and has not surrendered or stipulated away. It is entirely clear that the liability of the North Missouri company (stated in round numbers) is only \$288, and that of the Continental but \$616. So the formula given on behalf of the defendant falls short of full indemnity to the plaintiff, over \$700. Hence, it is incorrect; and the error in it is very apparent.

It is true the plaintiff had insurance to the amount of \$4,833 $\frac{1}{2}$ on his steers, and also on his bull valued at \$500, and to that extent the above formula is entirely applicable. But he had not that amount of insurance on the residue of the value of his bull. On such residue the North Missouri had no risk

Sherman vs. The Madison Mutual Insurance Company.

whatever; the Continental had a risk limited by its contract with the plaintiff to \$500 on the bull, which left only $\$327\frac{1}{2}$ on the residue of his value over \$500; and the defendant, after deducting its proportion of the loss on the steers and on the bull valued at \$500 (being \$260) had a risk of \$1,240 on such residue. So, instead of having an insurance of $\$4,833\frac{1}{2}$ on \$1,500 of the value of his bull, the plaintiff had only $\$1,567\frac{1}{2}$ insurance thereon. Suppose, instead of losing one bull worth \$2,000, the plaintiff had lost two bulls, one worth \$500 and the other \$1,500; and suppose, also, that the North Missouri policy did not include the latter, and that the liability of the Continental on both bulls was limited to \$500: the rule for adjusting the loss between the three companies would be perfectly plain. They would pay *pro rata* for the steers and the \$500 bull. The Continental would pay $\$327\frac{1}{2}$ of the value of the other bull, and the defendant would be liable for the balance thereof, being $\$1,172\frac{1}{2}$.

We think the case supposed and the one under consideration are identical in principle and results, and that the learned county judge correctly adjusted the liability of the defendant for the plaintiff's loss.

We construe the contract before us and adjust and determine the liability of the defendant, in the light of legal principles as we understand them, without resorting to the opinion of experts; yet we use their *computations* precisely as a court may use a computation of the amount due on a promissory note, verified by a witness on the stand. It is unnecessary, therefore, to determine whether the rule of adjustment in this or any other case may be proved by the testimony of experts.

By the Court.—Judgment affirmed.

Joliffe vs. The Madison Mutual Insurance Company.

JOLIFFE VS. THE MADISON MUTUAL INSURANCE COMPANY.

FIRE INSURANCE. (1-3) *Conditions in policy; validity; waiver.* (4-7) *Forfeiture of policy.* (4) *Waiver of forfeiture.* (5, 6) *Declaration of option must be unconditional.* (7) *Who may declare forfeiture.*

1. A condition in a policy of a mutual insurance company, that "when a note is taken for the cash premium, if it is not paid within sixty days after due, all obligations of the company to the insured, until such note is paid, are suspended," *held* valid.
2. If such condition had further provided that in case of default the whole cash premium *should be considered earned*, acceptance of the whole amount by the insurer after a loss *would not be a waiver* of the condition, or make the insurer liable for such loss; although such payment during the life of the policy would revive the risk from the date of the payment as to all of the insured property then remaining.
3. During the suspension of a policy, no premium is earned; and in the absence of a stipulation making the whole premium due on default as above described, acceptance of the whole after default, with notice of a loss which occurred during the default, *is a waiver* of the condition, and makes the insurer liable; such acceptance being inconsistent with any claim that the risk was suspended when the loss occurred.
4. An assessment by defendant on the premium notes of persons to whom it has issued policies, being payable absolutely, whether such policies have been forfeited or not, an acceptance of such a payment after a loss of which the company has notice, is not a waiver of any forfeiture.
5. Forfeitures are not favored in the law; and where one party to a contract has the option to declare it forfeited on breach of its conditions by the other, his declaration of a forfeiture must be made *unconditionally*, and in plain and positive terms.
6. By defendant's by-laws, its *directors* may at their option annul a policy of insurance, upon failure of the insured to pay an assessment upon his premium note within thirty days after demand. On December 11, 1871, the *executive committee* of the directors adopted a resolution, "that all policies upon which the assessment levied on the 19th of January, 1871, are not paid before the 31st of December, 1871, be annulled on that day." An assessment had been levied on the policy in suit on said 19th of January, 1871; and due notice of the resolution was given the insured. *Held*, that even if the executive committee had power to annul policies in such cases, the resolution and notice were a mere threat as to their future action, and not a valid exercise of their option.

Joliffe vs. The Madison Mutual Insurance Company.

7. Defendant's charter provides that policies and contracts may be signed and attested, "and all other business of said corporation may be conducted, by committees or otherwise, without the presence of the board of directors, and shall be binding on the said corporation if the same be done under or in conformity to" its by-laws and ordinances. The by-laws make it the duty of the executive committee "to determine upon and audit all accounts presented against the company for payment, and generally transact all business of the company, in the absence of the board of directors, not inconsistent with the by-laws." LYON, J., is of opinion that the committee had no power to declare policies forfeited for non-payment of assessments; but the question is not here decided.

APPEAL from the Circuit Court for *Jefferson* County.

Action upon a policy of insurance dated May 12, 1870, by which the defendant company insured the plaintiff's testator against loss by fire on certain personal property therein described, for the term of five years. The insured property was destroyed by fire February 1, 1872.

The cash premium of \$16.50 payable when the policy was issued was not paid at that time, but the plaintiff's testator gave his note therefor due January 1, 1871. He also gave the usual premium note for \$33, payable on call of the directors of the company. The note for the cash premium, not being paid at maturity, was sued, and judgment obtained thereon, a portion of which was paid before the loss. After the loss, and after the defendant had notice thereof, the balance of the judgment was paid to and accepted by the defendant without objection or reservation.

On the 19th of January, 1871, the defendant's board of directors made an assessment of twenty-five per cent. on all the premium notes of the company then in force, which included the premium note given by the plaintiff's testator; and payment of such assessment on the note last mentioned was duly demanded of the maker in April, and again in October of the same year; but the same remained unpaid until after the loss. After that time (but whether before or after the officers and agents of the defendant knew of the loss, does not clearly

Joliffe vs. The Madison Mutual Insurance Company.

appear), the assessment was paid to and accepted by the defendant company.

On the 11th of December, 1871, the executive committee of the board of directors adopted the following resolution: "*Resolved*, That all policies upon which the assessment levied on the 19th day of January, 1871, are not paid before the 31st day of December, 1871, be annulled on that day; and that such unpaid assessments be collected by law at once." Due notice of this resolution was immediately given to the plaintiff's testator. At a meeting of the board of directors held January 16, 1872, "the minutes of the July meeting, and of the several subsequent meetings of the executive committee, were read and approved."

There was no controversy in respect to the loss, or the amount and proofs thereof. The circuit judge held, 1. That receiving the unpaid balance of the cash premium after notice of the loss, was a waiver of the default in paying the same, estopping the defendant from asserting that its liability on the policy was suspended when the loss occurred; and 2. That the executive committee had no power to annul the policy, and the approval by the board of the minutes of the proceedings of that committee did not annul it. The judge assumed it to have been proved that when the assessment was paid, the company had notice of the loss; and he directed the jury to return a verdict for the plaintiff.

The defendant appealed from the judgment entered pursuant to such verdict.

B. E. Hutchinson, for appellant, argued, 1. That if any liability attached under the policy, it was at the moment of loss, and that by the express terms of the contract the liability of the company was suspended at that time, and the effect of the receipt of the balance of the cash premium was simply to cause the policy to reattach from the date of the receipt, and not to waive the condition. *Cardwell v. Republic Ins. Co.*, Ch. Leg. News, May 22, 1875; *Williams v. Ins. Co.*, 19 Mich.,

VOL. XXXIX.—8

Joliffe vs. The Madison Mutual Insurance Company.

451; *Wall v. Ins. Co.*, 36 N. Y., 157; *Reed v. Aetna Ins. Co.*, Court of Appeals of N. Y., cited in 19 Mich., 451. 2. The assured, as a member of a mutual company, was chargeable with notice of its by-laws; and besides he had actual notice of the penalty for nonpayment of the assessment. Upon the question of assessments, see 51 Pa. St., 402; *Kelly v. Troy Ins. Co.*, 3 Wis., 254; *Atlantic F. Ins. Co. v. Saunders*, 36 N. H., 252; *Ins. Co. v. Paige*, 1 Hilt., 430; *Coles v. Ins. Co.*, 18 Iowa, 425. 3. The forfeiture of his policy for nonpayment of an assessment does not relieve the assured from his liability to pay the assessment. *Iowa St. Ins. Co. v. Prosser*, 11 Iowa, 115; *Beadle v. Ins. Co.*, 3 Hill, 161; 6 Cranch, 192. How then can its receipt after forfeiture be a waiver? 4. The charter expressly authorizes the executive committee to act "without the presence of the board." And its act in this case became that of the board by *ratification*. *Howard Ins. Co. v. Ins. Co.*, 22 Conn., 394; *Atlantic F. Ins. Co. v. Saunders*, *supra*; 25 Barb., 146.

Wm. F. Vilas, for respondent, to the point that the defendant, by receiving the balance of the cash premium with full knowledge of the loss, had waived any forfeiture which might have been incurred by nonpayment, cited *Wing v. Harvey*, 27 Eng. L. & Eq., 140; *N. Berwick Co. v. Ins. Co.*, 52 Me., 336; *Miner v. Phœnix Ins. Co.*, 27 Wis., 693; May on Ins., §§ 361-3. He further argued that the executive committee had no power to annul the policy; and that even if it had been properly annulled, the company had waived all by its subsequent acts in receiving the cash premium, and assessment, sending out to the insured blanks to prove the loss, and placing its refusal to pay solely on the ground that the cash premium note had not been paid.

LYON, J. The application for the insurance upon the property covered by the policy in suit, signed by the plaintiff's testator, contains the following condition, which is part of the

Joliffe vs. The Madison Mutual Insurance Company.

contract of insurance, viz: "Whenever a promissory note shall be taken for the cash premium, the policy in all such cases shall be issued upon the express condition that if said note is not paid within sixty days after the same shall become due, thereafter all obligations of the company to the insured shall be suspended until such time as the said note shall be fully paid." The loss occurred while a portion of the cash premium, for which a note had been given, remained unpaid, and more than sixty days after such note became due. It occurred, therefore, at a time when, by the terms of the contract of insurance, the liability of the defendant company on the policy was suspended. This stipulation in the contract is not prohibited by statute, and is not against public policy. On the contrary, it is fair and reasonable that the insurer should be relieved from liability while the insured is in default in respect to payments of premiums, and like stipulations in insurance contracts have been enforced in numerous cases, among which are the following: *Baker v. Union Mutual Life Ins. Co.*, 43 N. Y., 283; *Pitt v. Berkshire Life Ins. Co.*, 100 Mass., 500; *Wall v. Home Ins. Co.*, 36 N. Y., 167; *Williams v. Albany City Ins. Co.*, 19 Mich., 451; *Beadle v. Chenango Co. Mut. Ins. Co.*, 3 Hill, 161. Other cases to the same effect will be found cited in *Gorton v. Dodge Co. Mut. Ins. Co.*, decided herewith. Hence, there can be no recovery unless the defendant has waived the above condition. The condition was inserted in the contract for the benefit of the defendant, and manifestly it was competent for the defendant to waive it. Has it done so? The only act of the defendant which is relied upon as such waiver, is the receipt by it of the unpaid balance of the cash premium, after the loss. The precise question is, therefore, Was the receipt of such balance by the defendant, after notice of the loss, a waiver of the condition of the contract by which the liability of the defendant on the policy was suspended when the loss occurred?

Had the agreement been that in case of default the whole

Joliffe vs. The Madison Mutual Insurance Company.

cash premium should be considered earned, and that the liability of the insurer should be suspended, or the policy be void, until such premium, or the note given therefor, should be fully paid, we should have but little difficulty with the question. In such case, the insurer, having earned the premium, would be entitled to receive it in any event. If paid during the life of the policy, it would revive the risk from the date of payment, as to all of the insured property remaining at that date; if not paid during the life of the policy, the insurer would be entitled to it, and might recover it by action. The premium would not, under such an agreement, cover any portion of the time during which the liability of the insurer was suspended. If the insurer accept the premium after default, such acceptance is not inconsistent with the claim that liability on the policy was suspended during default, and could not possibly mislead the insured to his prejudice. The insured pays and the insurer accepts just what the former is liable to pay and the latter is entitled to receive in any event, and the transaction lacks every essential element of a waiver or of an estoppel *in pais*. See cases above cited, particularly *Williams v. Ins. Co.*, 19 Mich., 451.

But this is not such a case. The stipulation in the contract before us is not that upon default for sixty days in the payment of the note given for the cash premium, such premium shall be considered earned, and therefore payable absolutely; but it is merely that the liability of the defendant shall be suspended from sixty days after the note became due until the same should be fully paid. The whole cash premium had not been earned when the defendant's liability on the policy was suspended, but only a *pro rata* portion of it. Neither did the premium run during the suspension; for risk and premium go hand in hand, and one ceasing, the other also ceases. A writer on this subject, speaking of the contract of insurance, says: "It is, moreover, a conditional contract; for when no risk attaches no premium is to be paid, or, if paid,

must, in the absence of fraud, be returned to the assured. In point of fact, the contract is to pay the premium on condition that the risk is run, and the refunding a premium is of frequent occurrence in maritime insurance; and that, too, in cases where it is entirely optional with the assured whether the property insured shall be put at hazard or not, as when the ship is never despatched by the owner on the projected voyage. The language of Lord MANSFIELD in *Tyrie v. Fletcher*, Cowp., 668, is explicit: 'When the risk has not been run, whether its not having been run was owing to the fault, pleasure or will of the insured, or to any other cause, the premium shall be returned.' And this principle is alike applicable to all policies of insurance." May on Insurance, § 4.

Applying these principles to the present case, it necessarily results, that at the expiration of sixty days from the time the note given for cash premium became due, the liability of defendant on the policy ceased, and, without restoring such liability, the latter was entitled to receive on such note what the policy had earned while in force, and it could have refused to receive any sum in excess of what the policy had so earned. But the defendant received the whole cash premium for which the note was given. By so doing, it received compensation for the risk covering the time when the loss occurred, and we think that it cannot now be heard to allege that at the time of the loss it had no risk on the property insured. The acceptance of the full premium after notice of the loss is entirely inconsistent with the claim that the risk was suspended when the loss occurred.

We conclude, therefore, in view of the peculiar terms of the contract, that the acceptance of the cash premium after default and notice of the loss, operated as a waiver of the suspension clause therein, and renders the defendant continuously liable on the policy the same as though the note for cash premium had been paid when due.

II. It remains to determine whether the policy was for-

feited, and the liability of the defendant thereon terminated, by the steps taken to that end because of the nonpayment of the assessment on the premium note.

It may be here observed, that the acceptance by the defendant of such premium after the loss, and even after the defendant had notice of the loss, is of no importance. Such assessment was due and payable absolutely, whether the policy was forfeited or not. *Iowa State Ins. Co. v. Prosser*, 11 Iowa, 115; *Smith v. The Saratoga County Mut. F. Ins. Co.*, 3 Hill, 508. It is apparent, from what was said on the other branch of the case, that the defendant waived nothing by accepting that which, in any event, was its due.

A by-law of the defendant provides that, "Whenever any assessments shall have been made upon the premium notes, and the sum determined which each person shall pay upon his note, if such sum shall not be paid within thirty days after the same shall have been demanded by the company or their agent, the directors may, at their option, annul the policy of insurance given upon such note, and may retain such note and collect such sum so assessed."

The charter of the defendant (Laws of 1851, ch. 394, sec. 6) provides that policies and contracts may be signed and attested, "and all other business of said corporation may be conducted and carried on, by committees or otherwise, without the presence of the board of directors, and shall be binding and obligatory on the said corporation, if the same be done under or in conformity to the by-laws and ordinances of said corporation." The by-laws provide for the appointment of an executive committee, and prescribe the functions of that committee as follows: "It shall be the duty of the executive committee to determine upon and audit all accounts presented against the company for payment, and generally to transact all business of the company, in the absence of the board of directors, not inconsistent with the by-laws."

The circuit judge denied the power of the executive com-

Joliffe vs. The Madison Mutual Insurance Company.

mittee to declare a forfeiture of the policy, and held that the action of the board of directors of January 16, 1872, failed to work such forfeiture. Speaking for myself alone, I may be permitted to say, that I fully concur with the learned judge of the court below. I think the by-law last quoted fails entirely to confer upon the executive committee the power to annul policies for nonpayment of assessments. The power given is to audit accounts and generally to transact all business of the company, in the absence of the board of directors. The meaning of the general words in the by-law should be ascertained by reference to the preceding special words therein, on the principle of *noscitur a sociis*, which is clearly applicable. Hence, the words "all business," as used in the by-law, mean all business pertaining to accounts and demands against the company. *Morse v. The Buffalo F. & M. Ins. Co.*, 30 Wis., 534. Moreover, the law does not favor forfeitures, and I think it safe to assume that the power to declare them cannot be taken by implication or inference, and that, unless expressly given, the power does not exist. As regards the resolution of the board of directors of January 16, 1872, approving certain minutes of the meetings of the executive committee, I fail to find in the record any satisfactory evidence that the board had before it the minutes of the committee meeting of December 11, 1871, at which the resolution of conditional forfeiture was adopted. But upon these points my learned associates express no opinion, and the decision of the case will be placed upon other grounds to which we all assent.

As before observed, forfeitures are not favored in the law, and will not be sustained upon mere inferences. Where, upon breach by one party of a condition or stipulation in a contract, the other party thereto has the option to declare the contract forfeited and thus relieve himself from liability upon it, and seeks to exercise such option, he must do so unconditionally, and in plain, positive and unmistakable terms. He

Joliffe vs. The Madison Mutual Insurance Company.

cannot put an end to his liability by saying to the other party, either before or after default, "Unless you perform your part of the contract by a certain future day (naming it), I shall elect to consider myself relieved of its obligations." This would be a mere notice or threat; not an effectual exercise of the option. The executive committee did nothing more than this in the present case; scarcely so much. They informed plaintiff's testator that unless the class of policy holders to which he belonged paid their assessments by a specified future day, their policies would be annulled on that day. This was a mere threat, and the most that the board of directors did was to approve the threat. Such action of the committee and of the board might as well have been taken on the day the assessment was made, and before the insured was in default in respect thereto; and manifestly it comes far short of being a declaration that policy No. 18,113, issued to John Uglow, was forfeited and annulled for nonpayment of the assessment of January 19, 1871. We find nothing in the case which will prevent the defendant company from making further assessments on the premium note given by Uglow, for losses accruing after the attempted forfeiture of the policy.

We conclude, therefore, that had the resolution of December 11, 1871, been passed by the board of directors at that time, instead of the executive committee, it would still fail to work a forfeiture of the policy in suit, because the forfeiture is declared conditionally, and because the resolution does not sufficiently specify the policies to be forfeited. There should be sufficient in the declaration of forfeiture to show that the board or committee acted specifically upon each policy sought to be annulled.

The foregoing views dispose of the case. The defendant having waived the stipulation that the risk should be suspended on default being made for more than sixty days in payment of the note given for the cash premium, and the policy not having been declared void or annulled for nonpay-

Gorton vs. The Dodge County Mutual Insurance Company.

ment of the assessment on the premium note, the circuit judge properly directed the jury to find for the plaintiff; and the judgment of the circuit court must be affirmed.

By the Court. — Judgment affirmed.

GORTON VS. THE DODGE COUNTY MUTUAL INSURANCE
COMPANY.

INSURANCE. *Insurer not liable when premium note unpaid.*

In an action on a policy of fire insurance, it appeared that plaintiff gave his note for the amount of the cash premium, with an agreement therein that if it were not paid at maturity, the whole amount of the premium should be considered as earned, and the policy be void while the note remained overdue and unpaid; and that the note matured before the loss complained of, and had never been paid. *Held*, that the insurer was not liable.

APPEAL from the Circuit Court for *Eau Claire* County.

Action upon a policy of insurance dated August 21, 1871, issued by the defendant company to the plaintiff, the term of insurance being five years. The insured property was destroyed by fire September 11, 1874. These facts appear from the complaint, and it is further alleged therein that the plaintiff paid for such insurance a premium of twenty-four dollars.

The second defense in the answer is to the effect that such premium was not paid in cash, but the plaintiff gave the defendant his promissory note therefor, payable May 1, 1872; that he never paid such note; and that it contained the following agreement: "And it is further agreed that if this note be not paid at maturity, the whole amount of premium on said policy shall be considered as earned, and the policy be null and void so long as this note remains overdue and unpaid."

Gorton vs. The Dodge County Mutual Insurance Company.

The plaintiff demurred to such second defense, for insufficiency; the circuit court made an order *pro forma*, sustaining the demurrer; and the defendant appealed therefrom.

The cause was submitted by both sides upon briefs.

Dixon, Hooker & Palmer (L. S. Dixon, of counsel), for appellant:

The condition that the policy should become void so long as the note remained overdue and unpaid, was a valid one; the breach of the condition was clear; and the obligation of the defendant was at an end long before and at the time of the fire. *Baker v. Ins. Co.*, 43 N. Y., 283; *Wall v. Ins. Co.*, 36 id., 157; *Pitt v. Ins. Co.*, 100 Mass., 500; *Williams v. Ins. Co.*, 19 Mich., 451; *Watrous v. Ins. Co.*, 35 Iowa, 582; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St., 67; S. C., 13 Am. Law Reg., N. S., 610; *Cardwell v. Ins. Co.*, Ch. Leg. News, May 22, 1875; *Patch v. Ins. Co.*, 44 Vt., 481; *Ferebee v. Ins. Co.*, 68 N. C., 11. See also *Keeler v. Ins. Co.*, 16 Wis., 537; *Dodge Co. Mut. Ins. Co. v. Rogers*, 12 id., 338, as to the validity of similar conditions in a policy. Neither can an unsuccessful demand of payment be construed into an abandonment or waiver of any of the terms or conditions of the note or policy, or as an alteration of the contract in any particular. *Baker v. Ins. Co.* and *Wall v. Ins. Co.*, *supra*.

Cousins & Hoyt (H. Cousins, of counsel), for respondent:

The note was accepted in payment of the premium; and from the time of its delivery and acceptance and the delivery of the policy to the respondent in consideration of the note, the contract of insurance was in force, and must continue to the end of the term, unless annulled by the act of the parties. In taking the note the company waived that clause of the policy which provides that "no contract for insurance shall be binding until the actual payment of the premium has been made." The note was payment, so far as that clause had any force. Its force once waived, its whole power was spent, and

Gorton vs. The Dodge County Mutual Insurance Company.

it ceased to be a part of the provisions of the contract as effectually as if it had never existed. Nor could it be revived by the act or default of either party, any more than if it had been erased from the contract entirely. *Goit v. Ins. Co.*, 25 Barb., 189; *Boehen v. Ins. Co.*, 35 N. Y., 131; *Trustees First Baptist Church v. Ins. Co.*, 19 id., 305. The policy having once been a binding contract, it required the assent of both parties to rescind it. 2 Parsons on Con., 190. Even if the failure of plaintiff to pay the note at maturity placed defendant in a position to declare the policy void, yet this alone does not make it void, but only voidable at the option of the company. *Huntley v. Perry*, 38 Barb., 569. The party having the right to rescind the contract must do it within the time specified, if there be such a time; if not, then within a reasonable time. *O'Kell v. Smith*, 1 Starkie, 107. Unless it clearly appears that the company had exercised this right before the loss, the court ought not to infer it. Forfeitures are not favored, particularly where the delay can be compensated for in money. *Boyd v. Talbert*, 12 Ohio, 212; *Smith v. Whitbeck*, 13 Ohio St., 471.

LYON, J. The agreement contained in the note given for the premium is part of the contract of insurance; and the cases cited by the learned counsel for the defendant abundantly show that under such contract the liability of the defendant on the policy was absolutely suspended by the failure of the plaintiff to pay the note when due. The note never having been paid, such liability was never restored; and the loss occurring after the plaintiff was thus in default, the defendant is not liable therefor. It is so held, and the reasons are sufficiently stated, in *Joliffe v. Madison Mut. Ins. Co.*, *ante*, p. 111. Those reasons need not be repeated here.

The portion of the answer demurred to states a perfect defense to the action; and the demurrer should have been overruled.

Thomas vs. Jones.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

THOMAS VS. JONES.

BANKRUPTCY: *When discharge in, cannot be impeached in a state court.*

1. In bankruptcy proceedings, the unintentional omission of a creditor from the schedule, or his failure to receive personal notice of the proceedings, does not render the discharge void as to him, or enable him to maintain an action on his demand in a state court.
2. *It seems* that a discharge in bankruptcy cannot be impeached in the state courts even on the ground of fraud, and that the only remedy is by application to the proper federal court to set aside the discharge; but it was not necessary to decide that question in this case.

APPEAL from the Circuit Court for *Dodge County*.

Action upon a promissory note. Defense, a discharge in bankruptcy proceedings in the district court of the United States. The evidence offered and exceptions taken thereto sufficiently appear in the opinion of the court.

Judgment for the defendant; from which the plaintiff appealed.

A. Scott Sloan, for appellant, argued that that view which permits a discharge in bankruptcy, in whatever court and at whatever time pleaded, to be attacked and impeached, is more in accordance with general principles and better sustained by authority than the one which would confine the remedy to an application in the court which granted the discharge (*Jones on Bankruptcy*, 131; *Perkins v. Gay*, 3 Bankrupt Reg., 189; *Beardsley v. Hall*, 36 Conn., 270; *Batchelder v. Low*, 43 Vt., 662; *Hill v. Robbins*, 22 Mich., 475; *In re Rosenburg*, 2 Bankrupt Reg., 81; *Barnes v. Moore*, id., 174); but that plaintiff does not seek to impeach the discharge, but only to

Thomas vs. Jones.

show that he is not affected or barred by it, invoking the aid of the rule that every man is entitled to his day in court. 1 Greenl. Ev., 524; 2 Phil. Ev., 10; *Adams v. Filer*, 7 Wis., 306; *Falkner v. Guild*, 10 id., 573; *Barnes v. Moore*, *supra*; *Anon.*, Supp. Bankrupt Reg., 27, WYLIE, J.; 43 Vt., 662.

Mariner, Smith & Ordway, for respondents, argued that ample remedies are furnished for amendments at all stages of the proceedings, by which omissions in the schedule of debts, or the names of creditors, may be supplied, and that any creditor whose debt is provable, whether it is proved or not, may object to the granting of a discharge, or apply to the court in which it was granted, to have it set aside or annulled (Bankruptcy Act of 1867, §§ 26, 31, 34; *In re Orne*, 1 B. R. Supp., XVIII; *In re Jones*, 2 id., 20; *In re McVey*, id., 85; *In re Connell*, 3 id., 113; *In re Pierson*, 10 id., 193; *Book's Case*, 3 McLean, 317; *In re Sheppard*, 1 id., 115; *In re Murdock*, 1 Lowell, 362); that the conduct of the plaintiff in maintaining silence and refusing to prove his claim after knowledge of the bankruptcy proceeding, was a fraud upon the act, and estopped him from questioning the decree of the court (*Hoyt v. Jones*, 31 Wis., 398; *Hudson v. Bingham*, 8 B. R., 503); that the jurisdiction of the United States court was exclusive, and a state court had no power to pronounce the discharge invalid; that the proceeding was in the nature of a proceeding *in rem*, all the world being made parties by the publication of the required notice; and that the plaintiff's only remedy was by application to the court in which the discharge was granted. *Shanahan v. Wherritt*, 7 How. (U. S.), 627; 17 Curtis, 328; *Corey v. Ripley*, 57 Me., 69; 4 B. R., 164; *Whitehead v. Mal-lory*, 4 Gray, 184; *Delafield v. Freeman*, 6 Bing., 294; *Grant v. Lyman*, 4 Met., 472; *Gervis v. G. W. Canal Co.*, 5 M. & S., 78; *Voorhees v. U. S. Bank*, 10 Peters, 449; *Hunt v. Columbian Ins. Co.*, 55 Me., 290; *Rankin v. Goddard*, id., 389; *Starkie on Ev.*, 372; *Nash v. Church*, 10 Wis., 312; *Kane v. Rock River Canal Co.*, 15 id., 179; *Dudley v. Mayhew*, 3

Thomas vs. Jones.

Coms., 10; *Millar v. Taylor*, 4 Burr., 2305; *Ocean National Bank v. Olcott*, 46 N. Y., 12; *Linn v. Hamilton*, 5 Vroom, 305; *Way v. Howe*, 108 Mass., 502; *Oates v. Parish*, 47 Ala., 157; *Parker v. Atwood*, 52 N. H., 181; *Dusenbury v. Hoyt*, 53 N. Y., 521; *Allstown v. Robinett*, 9 B. R., 74; 37 Texas, 56; *In re Archebrow*, 7 Ch. Leg. News, 99; *Lamb v. Brown*, id., 363; *Burnside v. Brigham*, 8 Met., 75; *In re Needham*, 1 Low., 309; 2 B. R., 124; *Burpee v. Sparhawk*, 108 Mass., 111; *Stevens v. Mechanics' Bank*, 101 id., 110; *Symonds v. Barnes*, 59 Me., 191; *Mitchell v. Singletary*, 19 Ohio, 291; *Fox v. Paine*, 10 Ala., 523; *Payne v. Able*, 4 B. R., 67; *Brown v. Rebb*, 1 Rich. Law., 374; *Randall v. Sutton*, 2 Houst., 510; *Hubbell v. Cramp*, 11 Paige, 310; *Mil. & St. P. R. R. Co. v. M. & M. R. R. Co.*, 20 Wis., 165; *Brigham v. Claflin*, 31 id., 607; *Bryant v. Small*, 35 id., 205.

COLE, J. This is an action on a promissory note. The defendant set up in his answer, as a defense, his discharge in bankruptcy, and upon the trial gave in evidence the certificate of his discharge in due form. The plaintiff then gave in evidence, against the objection of the defendant as to their admissibility, the proceedings in bankruptcy, for the purpose of showing that he was not named as a creditor in the schedule of debts filed by the bankrupt; that his name did not appear in such proceedings; and that no notice in writing of those proceedings was ever personally served upon or mailed to him. It did, however, appear that the usual notice of the bankruptcy proceedings was published in the newspapers, and the plaintiff testified that he knew by hearsay of the pendency of the proceedings some months before the discharge was granted. The question therefore is, whether, upon such a state of facts, the discharge in bankruptcy is a bar to this action.

The counsel for the plaintiff insists that the certificate of discharge is not conclusive, but may be attacked for fraud or want of jurisdiction, in the state court. We will say at the

Thomas vs. Jones.

outset, that to our minds there is no evidence in the case which will warrant the inference that the bankrupt omitted the plaintiff's name from his schedule for any fraudulent purpose. The omission might have been entirely unintentional, a mere accident; and it is but fair to assume upon this record that it was. The question is not presented which was before the court in *Batchelder v. Low*, 43 Vt., 666, and in *Beardsley v. Hall*, 36 Conn., 270, as to the effect of a discharge obtained through fraud. In those cases it was held that where the bankrupt had been guilty of a fraudulent omission of a debt from his schedule, or had fraudulently omitted property from his schedule of assets, the discharge could be collaterally attacked or impeached on that ground in a state court. But the doctrine of these cases is manifestly not considered sound in *Corey v. Ripley*, 57 Me., 69; *Way v. Howe*, 108 Mass., 502; *The Ocean Nat. Bank v. Olcott*, 46 N. Y., 12; and *Oates v. Parish*, 47 Ala., 157, where the courts in effect hold that the certificate cannot be impeached in a state court on the ground that it was improperly granted, but the remedy given under the bankrupt law, by application to the district court of the United States to set aside the discharge, is exclusive of any other mode of impeaching its validity. And we are inclined to adopt this view of the law as the correct one. But, without dwelling upon that point, which is not in this case, what is the effect of the discharge as against a creditor whose name was omitted from the schedule without any fraudulent purpose or design on the part of the bankrupt, and who consequently was not personally notified of the pendency of the bankrupt proceeding? Can such creditor impeach the validity of the discharge, in a state court, for that reason; or is the discharge conclusive upon him? It was undoubtedly the duty of the bankrupt to make out and deliver to the messenger a correct schedule of his creditors, and an inventory of his estate, verified as required by the act (sections 11 and 42), in order that each creditor might have

Thomas vs. Jones.

notice of the proceeding and an opportunity to be heard in respect to it. But an unintentional failure to name a creditor in the schedule, or failure to receive personal notice of the proceeding, does not, we think, render the discharge void as against the creditor omitted. For, in addition to the notice by mail or personally, the law provides for the publication of notices in such newspapers as the warrant designates, and the publication of that notice must have the effect of making the proceeding binding on the plaintiff so far as the state courts are concerned. The publication of the notice is binding upon all persons, whether they have or have not actual knowledge thereof, so that the subsequent payment of a debt or the delivery of property to the bankrupt affords no protection as against the assignee. *Stevens v. Mechanics' Savings Bank*, 101 Mass., 109; *Burpee v. Sparhawk*, 108 id., 111. In *Burnside v. Brigham*, 8 Met., 75, it was decided that a creditor could not avoid a discharge in bankruptcy, under the law of 1841, by merely showing that the bankrupt in his petition omitted his name in the sworn list of creditors, and that by reason of such omission he had no notice of the proceedings, and could neither prove his claim against the bankrupt, nor oppose granting his discharge. It was held that, in order to avoid such discharge by reason of such omission, the creditor must show that the omission was willful and fraudulent. Although that case arose under a different statute, yet the reasoning of C. J. SHAW is strictly applicable to the question before us (see also *Re Needham*, 1 Lowell, 309); and we follow it as a correct exposition of the law of 1867.

The counsel for the plaintiff invokes the aid of the rule that every person is entitled to his day in court, and that, in order to bind him by a judicial proceeding, he must have notice thereof and an opportunity to be heard. This, as a general principle, is true, but it has its exceptions. *Burnside v. Brigham*, *supra*; *Shawhan v. Wherritt*, 7 How. (U. S.), 627.

In this case the only question to be considered was, whether

Pitzner vs. Shinnick.

a discharge had been granted the defendant; and if so, it was conclusive upon the plaintiff in the state court. This view disposes of the case.

By the Court.—The judgment of the circuit court is affirmed.

PITZNER VS. SHINNICK.

NEGLIGENCE: RAILROAD CROSSINGS. (1) *Recovery not allowed for injury of which plaintiff's negligence was a proximate cause.* (2) *The rule applied to killing of cattle where defendant has left open gate at railroad farm-crossing.* (3) *Questions of negligence for the jury, unless proof conclusive.*

1. The general rule is, that a party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause. Whether *McCall v. Chamberlain*, 13 Wis., 637, creates an exception to this rule, and whether the doctrine of that case would be followed by this court in a similar case, are questions not here determined.
2. Under sec. 32, ch. 119, Laws of 1872, which declares that any person who shall open bars or gates on a railroad farm crossing, and not immediately close the same, shall be liable to the party injured for all damages resulting from such act, one whose cattle have escaped upon a railroad through such open bars or gate, and have there been killed by a train, cannot recover from the person by whose fault such bars or gate were left open, if he had negligently suffered the cattle to escape from his own premises to the farm of another, on which such railroad crossing is situate.
3. Questions of negligence are for the jury, unless the proof is conclusive; and upon the evidence in this case it was error to nonsuit the plaintiff on the ground that he was guilty of contributory negligence.

APPEAL from the Circuit Court for *Jefferson* County.

Action to recover the value of cows belonging to the plaintiff, which escaped from his farm and were killed on the track of a railroad adjacent thereto. The facts upon which it is claimed that the defendant is liable, as they are stated in the pleadings and appear from the evidence, are as follows:

Pitzner vs. Shinnick.

Plaintiff is the lessee and occupant of a farm in Jefferson county; and defendant is the owner and occupant of an adjoining farm on the west. The railroad track of the Chicago & Northwestern Railway Company extends across the defendant's farm near its east line. Between the track and the west line of plaintiff's farm, defendant has a narrow wood lot; and adjoining thereto on the east the plaintiff has a pasture lot. Between such pasture and wood lots there is a defective line fence, which does not appear ever to have been divided, or the portion thereof to be maintained by the owner or occupant of each farm, ascertained. The railroad track is fenced across defendant's farm, and through the town. On such farm there is what is termed a farm crossing, with gates in the railroad fence, one of which opens into such wood lot, and the other is opposite thereto in the fence on the west side of the track.

During the afternoon of Wednesday, October 7, 1874, and when the plaintiff was temporarily absent from his farm, several of his cows escaped from his pasture, went on the railroad track, and during the following night were run against and killed by a passing train. On his return home towards evening, plaintiff discovered that his cows were missing, and searched for them until dark, but without success. He did not find them until after they were killed. The testimony tends to show that the cows passed from plaintiff's pasture over such defective line fence into defendant's wood lot, and through the open gate to the track, where they were killed. It also tends to show that defendant permitted the gate at the farm crossing to remain open at and before the time the cows were killed; and that plaintiff did not use ordinary care to prevent the escape of the cows from his own premises. Further reference to the testimony will be found in the following opinion.

It is claimed that the defendant is liable to pay for the cows by virtue of the provisions of sec. 32, ch. 119, Laws of 1872, which is the same as sec. 3, ch. 268, Laws of 1860 (Tay.

Pitzner vs. Shinnick.

Stats., 1044, § 36). The preceding sections provide for fencing railroads and for constructing cattle guards, farm crossings, gates and bars, etc. The section above cited is as follows: "When such fences, cattle guards or crossings shall be constructed as contemplated by this act, any person who shall willfully take down, open or remove the same, or any portion thereof, or allow the same to be taken down, opened or removed, shall, upon conviction, be subject to a fine of not less than ten dollars nor more than fifty dollars, and shall, in addition thereto, be liable to the party injured for all damages resulting from the taking down, opening or removing of such fence, cattle guard or crossings. This section shall not be construed so as to prevent the taking down of bars, or the opening of gates, for the purpose of passing through the same; but any person who shall take down bars or open gates, and not immediately replace or close the same, shall be liable to all the penalties provided for in this section."

When the plaintiff had closed his testimony, the circuit judge, on defendant's motion, ordered a nonsuit; and from the judgment entered pursuant to this order the plaintiff appealed.

Harlow Pease, for appellant:

The liability imposed by the statute (Tay. Stats., 1044, § 36) is absolute, and, in the absence of proof of contributory negligence, plaintiff is entitled to recover, whether the cattle were rightfully or wrongfully on defendant's land, from which they passed through the gate upon the track. Sec. 15, ch. 122, Laws of 1856, required the La Crosse & Milwaukee R. R. Co. "to fence its road in a good, proper and substantial manner," without defining its liability for not doing so. Under this provision it has been held by this court that the intention of the statute was to protect, not only adjacent land-owners, but the public generally, and that the common-law rule in regard to fences was repealed. *McCall v. Chamberlain*, 13 Wis., 637. See, also, *Laude v. C. & N. W. R'y Co.*, 33 Wis., 640. Now these gates and bars at farm crossings form a part of the

Pitzner vs. Shinnick.

fence, and are constructed and maintained as such by the railroad company, as required by the statute. The duty of keeping them closed is created by the same statute which requires them to be built, and is equally imperative. It follows that the liability for a neglect of that duty is analogous to the liability of the company for a failure to construct and maintain them. Any other construction not only renders the statute nugatory, but imposes upon railway companies a useless and burdensome expense. 2. There was no proof of contributory negligence. The fact that plaintiff knew that the gate had been left open previous to the time when his cattle were killed, cannot be construed into a consent on his part that it should be open, neither can it operate to defeat his remedy. *Laude v. C. & N. W. R'y Co.*, *supra*; *McCoy v. C. P. R. R. Co.*, 6 Am. R., 623, Am. Law Reg., May, 1875, 269-272. 3. The question of contributory negligence should at least have been submitted to the jury. *Langhoff v. M. & P. du C. R'y Co.*, 19 Wis., 489.

The cause was submitted for the respondent on the brief of V. W. Seeley, who argued that at common law, as well as by statute, the owner of cattle is bound to restrain them from trespassing upon his neighbor's land, and, if he neglects to do so, he is not only precluded from recovering any damages for any injury which they may sustain by reason of their trespassing, but is himself liable for the trespass. *McCall v. Chamberlain*, 13 Wis., 637; *Jackson v. R. & B. R. R. Co.*, 25 Vt., 150; *Bemis v. Connecticut R. R. Co.*, 42 id., 375; *Holladay v. Marsh*, 3 Wend., 142; *Wells v. Howell*, 19 Johns., 385. And the common-law rule has not been changed by the act of 1860. Shearm. & Redf. on Neg. (2d ed.), § 322; *Ryan v. R. R. Co.*, 9 How. Pr., 453, and cases above cited. Plaintiff, therefore, in permitting his cattle to go at large, was guilty of an act of gross negligence, which would preclude a recovery for anything but a willful injury. *C. & N. W. R'y Co. v. Goss*, 17 Wis., 428; *Galpin v. C. & N. W. R'y Co.*, 19

Pitzner vs. Shinnick.

id., 609; *Russell v. Hanley*, 20 Iowa, 219. Having actual or constructive notice that the gate was being left open, and not having used ordinary care to prevent the cattle from passing through it, he cannot recover for damages which might have been avoided by the use of such care. *Shearm. & Redf.*, 541, and cases there cited. And his negligence appearing from his own evidence, he was properly nonsuited. *Achtenhagen v. Watertown*, 18 Wis., 331; *Delaney v. M. & St. P. R'y Co.*, 33 id., 67.

LYON, J. It is claimed by the learned counsel for the plaintiff, that, if the defendant allowed the gate at his crossing to remain open at and before the time the plaintiff's cows were killed, and the cows went on the track through such open gate, the defendant is absolutely liable for the loss of the cows, even though the plaintiff was himself guilty of negligence which contributed directly to the loss.

There is testimony in the bill of exceptions tending to show that the defendant owned and occupied the farm on which the gate in question is located, and that such gate was left open constantly for several days immediately preceding, and down to the time the cows were killed. Also that during such time the sons of the defendant (who probably resided with him) passed through the gate and left it open behind them. With this testimony in the case, we are unable to say that there is no testimony tending to show that the defendant allowed the gate (and therefore the railroad fence of which the gate is a part) to remain open. That there is testimony tending to show that the cows went through the open gate to the railroad track, is indisputable.

We are now to consider whether the liability of the defendant for the loss of the cows is absolute, as it is claimed, or whether his liability depends upon the absence of negligence on the part of the plaintiff contributing proximately to the loss. In considering this question, it will be assumed that the

Pitzner vs. Shinnick.

defendant allowed the gate to remain open in violation of the statute, and that, had the gate been kept closed, the cows would not have been destroyed.

To support the position that the defendant is absolutely liable, counsel for the plaintiff relies mainly upon the case of *McCall v. Chamberlain*, 13 Wis., 637. Sec. 1, ch. 268, Laws of 1860, required every railway company to fence its road, and to construct cattle guards, etc., within a prescribed time, and provided that "until such fences and cattle guards shall be duly made, the railroad company, its agent or agents, the trustees, lessee, or other parties having control and management of any such road, shall be liable for all damages which shall be done by the agents or engines, to cattle, horses or other domestic animals thereon, occasioned by failure to erect such fences or cattle guards as herein required." It was held in *McCall v. Chamberlain*, that if the railway company neglected to make such fence within the prescribed time, "it would be liable for all damages to animals straying on the track through the want of such fence, without reference to the question whether there was negligence or want of skill in managing the cars at the time of the injury, or to the question whether such animals were rightfully or wrongfully on the adjoining land from which they escaped on the track." The above extract is taken from one of the head notes to the case, and it seems to state accurately the points decided. It is not entirely certain that the court intended to hold, in that case, that the owner of the cattle could recover if he negligently permitted them to become trespassers upon the adjoining lands, with knowledge that for want of fences they were liable to go upon the railroad track and to be run over by passing trains. Whatever inferences may be drawn from the language of the opinion in that case, there is no express assertion of any such doctrine.

In the subsequent case of *Antisdel v. C. & N. W. R'y Co.*, 26 Wis., 145, the late Mr. Justice PAINE (by whom the opin-

Pitzner vs. Shinnick.

ion was prepared in *McCall v. Chamberlain*) drew a distinction between the liability of a railway company for injuries resulting from a failure to fence the road in the first instance, and liabilities resulting from its failure to keep the fence in repair after its erection, and concedes that in the latter case the question of care and diligence is involved. See also *Ward v. The Town of Jefferson*, 24 Wis., 342.

In *Laude v. The C. & N. W. R'y Co.*, 33 Wis., 640, also cited and relied upon by counsel for the plaintiff, the colts of Laude escaped from his yard, without his fault, and went upon the track of the railroad from lands upon which they were trespassers, through an opening in the railroad fence, and were run against by a passing train and killed. The opening in the fence had existed for a long time, and was known to the agents of the railway company, who had ample time before the colts were killed in which to repair the fence. It was held that the fact that the colts went upon the track from lands upon which they were trespassers, did not defeat the action; but the doctrine is clearly recognized, that, had the colts escaped because of the fault or negligence of the owner, the action could not have been maintained.

The statute which makes towns liable for injuries caused by defective highways therein, is just as positive and unconditional in its terms as the statute under which it is sought to hold the defendant liable in this action. Its language is: "If any damage shall happen to any person, his team, carriage or other property, by reason of the insufficiency or want of repairs of any bridge, or sluiceway, or road, in any town in this state, the person sustaining such damages shall have a right to sue for and recover the same against such town, in any court having jurisdiction thereof." R. S., ch. 19, sec. 120 (Tay. Stats., 513, § 156). Yet in numerous cases brought under this statute, this court has held that if the negligence of the plaintiff contributed proximately to the injury, there could be no recovery. The following are some of the later cases

Pitzner vs. Shinnick.

in which this doctrine is asserted or recognized: *Cremar v. Town of Portland*, 36 Wis., 92; *Montgomery v. Town of Scott*, 34 id., 338; *Perkins v. Fond du Lac*, id., 435; *Harves v. Town of Fox Lake*, 33 id., 438; *Burns v. Town of Elba*, 32 id., 605; *Wheeler v. Town of Westport*, 30 id., 392; *Houfe v. Town of Fulton*, 29 id., 296.

Again, it was enacted in sec. 41, ch. 79, R. S., that no railroad train should go faster than at the rate of six miles per hour in a city until it had passed all the traveled streets therein; and sec. 25 of the same chapter provided that in case of the destruction of life by a violation of that chapter, for every life destroyed the offending party should be liable to the representatives of the deceased in a sum not exceeding \$50,000 nor less than \$10,000. The case of *Langhoff, Adm'r, etc., v. The Milwaukee & Prairie du Chien R'y Co.*, 19 Wis., 489, and *S. C.*, 23 id., 43, was brought under the above provisions. The evidence tended to show that the death complained of was caused by the violation of the statute by the railway company; but it appeared (as the court held when the case was last here) that the negligence of the deceased contributed thereto. Notwithstanding the positive, unconditional terms of the statute imposing the liability, it was held that, because of such contributory negligence of the deceased, there could be no recovery.

The general rule undoubtedly is, that a party cannot recover for an injury of which his own negligence was, in whole or in part, the proximate cause. *Cunningham v. Lyness*, 22 Wis., 245, and cases there cited. If *McCall v. Chamberlain* is an exception to this rule, the case seems to stand alone in our reports. And the cases are so numerous in which the rule has been applied, that we do not feel at liberty to make other exceptions to it. We neither affirm nor disaffirm the doctrine of that case. When another like it shall be presented, the court will determine the scope and extent of that decision, and whether it shall be followed or overruled.

Pitzner vs. Shinnick.

We hold that if the plaintiff negligently suffered his cattle to escape from his own premises to the farm of the defendant, he cannot recover in this action, even though in all other respects he may be entitled to judgment.

But it does not necessarily follow that the nonsuit was properly ordered. Unless the testimony showed conclusively that the negligence of the plaintiff contributed directly to the destruction of his cows, the question of negligence was one for the jury, and the court was not justified in taking the case into its own hands and nonsuiting the plaintiff. *Jalie v. Cardinal*, 35 Wis., 118. See also Vilas and Bryant's note to *Achtenhagen v. Watertown*, 18 id., 347. Does the testimony show conclusively that the plaintiff was guilty of such contributory negligence? It certainly tends to show such negligence on his part; and had the jury found him guilty of it, the verdict could not be disturbed on the ground of want of testimony to support it. Yet it appears, or at least there is testimony tending to show, that the plaintiff made some effort to keep his cows on his own premises. He yarded them nights, and made immediate search and inquiry for them on his return home after they escaped from his pasture. Besides, there is some confusion in the testimony concerning the plaintiff's knowledge that his cattle were accustomed to go upon the defendant's land, and that the gate at the crossing was habitually left open. These facts seem to render the case a very proper one for the consideration of a jury. Upon the whole case we think the proof of plaintiff's alleged contributory negligence is not so clear and conclusive as to justify the court in ordering a nonsuit. For this reason there must be a new trial.

By the Court.—The judgment of the circuit court is reversed, and a *venire de novo* awarded.

Kirk vs. The Dodge County Mutual Insurance Company.

KIRK VS. THE DODGE COUNTY MUTUAL INSURANCE COMPANY.

BILLS AND NOTES: *When negotiable.*

1. A note by which the maker promises absolutely to pay to the order of the payee a sum certain, at a fixed time, such payment not being dependent upon a contingent event, nor out of a particular fund, is negotiable.
2. Where such a note is given to an insurance company for the premium upon a policy of insurance, its negotiable character is not affected by a further agreement therein, that if it shall not be paid at maturity, the whole amount of premium on such policy shall be considered as earned, and the policy shall be void while the note remains overdue and unpaid.

APPEAL from the Circuit Court for *Pepin* County.

Action to recover the amount of an insurance policy issued by the defendant company, dated January 12, 1875, upon the plaintiff's hotel property in the town of Waterville, in Pepin county.

The complaint alleges a compliance by the plaintiff with all the conditions of the policy; a total loss by fire on the 14th day of February, 1875; due notice thereof to the defendant; and a demand and refusal of payment.

The answer alleges, as a defense, the execution by plaintiff of an instrument in writing, which is set forth at length in the opinion; the failure of the plaintiff to pay the same, according to its terms, on the 12th of February, 1875; and that, in consequence thereof, the policy became inoperative and void, and so remained at the time of the loss.

From an order sustaining a demurrer to the answer, the defendant appealed.

The cause was submitted by both sides on briefs.

Dixon, Hooker & Palmer (*L. S. Dixon*, of counsel), for appellant, to the point that the condition annexed to the note destroyed its negotiability, and therefore no days of grace existed, cited *Robert v. Ins. Co.*, 1 Bigelow's L. & A. Ins. R., 644; *S. C.*, 1 Disney, 355; 1 Parsons on B. & N., 45; *Martin v.*

 Kirk vs. The Dodge County Mutual Insurance Company.

Chauntry, 2 Strange, 1271; *Knight v. W. & M. R. R. Co.*, 1 Jones' Law (N. C.), 357; *Barnes v. Gorman*, 9 Rich. Law, 297; *Wallace v. Dyson*, 1 Spears' Law, 127; *Austin v. Burns*, 16 Barb., 643; *Hubbard v. Mosely*, 11 Gray, 170; *American Ex. Bank v. Blanchard*, 7 Allen, 333; *Blake v. Coleman*, 22 Wis., 415; *Overton v. Tyler*, 3 Pa. St., 346; *Union Mut. Life Ins. Co. v. McMillen*, 24 Ohio St., 67; *S. C.*, 13 Am. Law Reg., N. S., 610; 4 Bigelow's L. & A. R., 384, 390; *Zimmerman v. Anderson*, 67 Pa. St., 421; 5 Am. R., 447; *Arnold v. R. R. Co.*, 5 Duer, 207.

Cousins & Hoyt (*H. Cousins*, of counsel), for respondent, contended that, the note being taken in payment of the premium, the policy took effect from delivery, and must continue in force until default in payment of the note at least, whatever might be the consequences of nonpayment at maturity; that there could be no default until the note became due (*Mutual Life Ins. Co. v. French*, 2 Cin. Sup. Ct. R., 321; *Pitt v. Ins. Co.*, 100 Mass., 500; *Goit v. Ins. Co.*, 25 Barb., 189); and that the note was negotiable and entitled to grace. 2 Bouv. Law Dic., 392; *Wall v. Ins. Co.*, 36 N. Y., 158; *Alliance Mut. Ins. Co. v. Swift*, 10 Cush., 433; *Cary v. Nagel*, 2 Biss., 244; *Frost v. Ins. Co.*, 5 Denio, 154; *Bull v. Sims*, 23 N. Y., 570; *Sanders v. Bacon*, 8 Johns., 485; *Cota v. Buok*, 7 Met., 588; *Hodges v. Shuler*, 22 N. Y., 114; *Taylor v. Curry*, 109 Mass., 36; *Bank of Washington v. Triplett*, 1 Pet., 25; *Hopping v. Quin*, 12 Wend., 517; R. S., ch. 60, sec. 5.

COLE, J. The question in this case is, whether an instrument of which the following is a copy, is a negotiable promissory note:

"\$40.00. ARKANSAW P. O. E. N. Stillman, Agent. Pepin Co., Wis., Jan'y 12, 1875. On or before the 12th of February next, for value received, I promise to pay to the Dodge County Mutual Insurance Co. or order, at their office in Waupun,

Kirk vs. The Dodge County Mutual Insurance Company.

Wis., forty dollars for premium for insurance policy No. 2,193 in said company.

"And it is further agreed that if this note be not paid at maturity, the whole amount of premium on said policy shall be considered as earned, and the policy be null and void so long as this note remains overdue and unpaid. Interest at the rate of ten per cent. per annum until paid. W. G. KIRK."

If the above is a negotiable promissory note, it was not due when the property insured was destroyed by fire on the 14th of February, 1875, and the company is responsible for the loss.

It seems to us there can be no doubt about the character of the instrument. It has all the essential qualities of a promissory note as defined in the books. It is a promise to pay to the order of the company a specified sum of money, at a fixed time; the payment not dependent on any contingency, nor payable out of a particular fund. Says SHAW, C. J., in *Cota v. Buck*, 7 Met., 588: "The true test of the negotiability of a note seems to be, whether the undertaking of the promisor is to pay the amount at all events, at some time which must certainly come, and not out of a particular fund, or upon a contingent event. If it were payable on a contingency, or out of a particular fund, it would not be negotiable." Whatever doubt might exist in that case as to whether the undertaking to pay was absolute and to be made within a certain limited time, there would seem to be no uncertainty upon any of those points in the case before us.

It is said, however, that the memorandum attached to the note is in the nature of a condition which destroys the negotiable character of the instrument. That memorandum in no degree qualifies the absolute promise of the maker to pay the note on or before the 12th day of February thereafter. The maker stipulates that if he fails to pay at the maturity of the note, the whole amount of premium on the policy shall be considered earned, and that while he should be in default the property would be at his own risk. This is the substance of

Magoon vs. Callahan.

the memorandum. But it does not affect or change the maker's liability on the note. That continues, though the policy may have become forfeited by his failure to pay at the time specified. The effect of such a memorandum on the rights of the insurer and insured is quite fully considered in *Williams v. Albany City Ins. Co.*, 19 Mich., 451; though there the question was, whether the company was liable on the policy for a loss occurring during the default to pay the note. That, of course, is a different question from the one before us. Here the question is, whether the character of the instrument is affected by the memorandum attached. And we perceive no ground for holding that it is. The case of *Blake v. Coleman*, 22 Wis., 415, is clearly distinguishable from the one at bar. See *Ward v. Perrigo*, 33 Wis., 143; *Sanders v. Bacon*, 8 Johns., 485; *Hodges v. Shuler*, 22 N. Y., 114.

We think the order of the circuit court, sustaining the demurrer to the answer, is correct, and must be affirmed.

By the Court. — Order affirmed.

MAGOON VS. CALLAHAN.

FORECLOSURE OF LAND CONTRACT: VACATING JUDGMENT. (1) *Defendant not required to deposit money alleged to have been paid.* (2) *Allowed one year for making payment.* (3) *Required to pay sum admitted to be due as a condition of opening judgment.*

Upon a complaint for a strict foreclosure of a contract for the purchase of land of which plaintiff claimed to have the legal title, judgment was rendered in default of an answer, requiring defendant to pay the contract price, with interest, etc., within fifteen days, or, in default thereof, barring his rights. Upon affidavits excusing his default, defendant moved at the next term to set aside the judgment, and for leave to file an an-

Magoon vs. Callahan.

swer alleging that on the day of the date of said land contract, and for a long time previous, he was the owner of said land; that on that day he borrowed of the plaintiff the sum named in said contract, and, to secure payment of the same, executed and delivered to the plaintiff a deed of said land, and took from him the contract in question; that he was then a married man, said land was his homestead, and his wife did not execute or assent to his said deed, for which reason it was void; and that he had paid fifty dollars interest not allowed in the judgment. The court granted the motion on condition that defendant, within ninety days, deposit with the clerk for plaintiff the principal sum admitted by the answer to be due, with interest from the date of the contract, fifty dollars not to be paid by the clerk to the plaintiff until the further order of the court relative thereto, made after the final hearing of the action. On appeal by the defendant, *Held*,

1. That the order should be so far modified as not to require defendant to deposit the fifty dollars alleged to have been paid.

2. That if the facts stated in the answer are true, the deed and contract therein mentioned probably constitute a mortgage, upon the foreclosure of which the mortgagor would have a year to redeem from the sale; and the order should therefore be so modified as to give defendant a year for making his payment.

3. That as the defense set up in the proposed answer affects the validity of the instruments as a security, the court did not err in requiring the defendant, as a condition of opening the judgment, to pay the sum admitted to be due. *Hanson v. Michelson*, 19 Wis., 499, distinguished.

APPEAL from the Circuit Court for *La Fayette* County.

Action for the foreclosure of a contract for the purchase of land. The complaint alleged that the plaintiff, on the 6th of January, 1871, was the owner and in possession of the land; that on that day he entered into a written agreement with the defendant to convey it to him on or before one year from that date, upon the payment of \$500, with interest at ten per cent., time being of the essence of the contract; and that defendant had not paid the purchase money, or interest thereon, or any portion thereof, the time having long since elapsed. Prayer, for a strict foreclosure. Judgment by default, May 26, 1875, requiring defendant to pay the amount found due by June 10, 1875, or, in default thereof, that he be forever foreclosed, etc. At the June term, 1875, defendant moved

Magoon vs. Callahan.

to set aside the judgment, upon affidavits excusing the default, together with his sworn answer. The answer alleged that at the date of the contract defendant was the owner of and resided upon the premises, the same being his homestead; that on that date he borrowed of plaintiff \$500 for one year, agreeing to pay interest at ten per cent., and paid plaintiff on the same day \$50 in full for interest to January 6, 1872, when the whole amount would become due; that at the time of executing the contract described in the complaint, he executed to plaintiff a deed of the premises solely for the purpose of securing said loan of \$500; and that he was married, but his wife did not join in such conveyance. July 1, 1875, the court set aside the judgment, upon condition that defendant, within ninety days from that date, should deposit with the clerk, for plaintiff's use, the sum of \$500, and interest thereon at ten per cent. from January 6, 1871, according to the terms of the contract, \$50 thereof not to be paid by the clerk to the plaintiff until the further order of the court made after the final hearing of the cause. Defendant appealed from that portion of the order imposing the above conditions.

The cause was submitted by both sides on briefs.

P. A. Orton and *C. F. Osborn*, for appellant:

It was a gross abuse of discretion in the court to grant the motion upon conditions which, if complied with, would render the answer unavailing. *Johnson v. Eldred*, 13 Wis., 482; *Rublee v. Tibbetts*, 26 id., 401. The court seems to have proceeded upon the theory that the defense was unconscionable, and ought not to be permitted. But, even putting it upon the same footing as the defenses of usury and the statute of limitations, the judgment should have been set aside and the answer let in. "The courts should not undertake to say that certain defenses provided by law are hard and unconscionable, and therefore undertake to legislate against them." *Bank of Kinderhook v. Gifford*, 40 Barb., 659. The answer shows that the transaction between *Magoon* and *Callahan* consti-

Magoon vs. Callahan.

tuted a mortgage, both at law and in equity. *Kent v. Agard*, 24 Wis., 378; *Sage v. McLaughlin*, 34 id., 557. If so, the judgment should have been for foreclosure and sale, since this is the only way in which defendant's equity can be foreclosed. Defendant would then have a year from the time of sale within which to redeem; an important and sacred right, which he loses by this judgment.

Magoon & Francis, for respondent:

The terms imposed rested solely in the discretion of the court, and the facts disclosed show no abuse of that discretion. The defense disclosed by the answer is an inequitable and unconscionable one, and the terms imposed were no more than just. It is difficult to discover any distinction in principle between that defense and the defense of usury; and courts of equity have always required, as a condition of aiding a party against usury, that he should pay into court the amount actually due. See *Dole v. Northrop*, 19 Wis., 249; *Jones v. Walker*, 22 id., 220; *Weber v. Zeimet*, 27 id., 685.

COLE, J. It is practically conceded that the circuit court properly set aside the judgment on the ground that the defendant's default was excused. The only question is, whether the terms imposed as a condition to allowing the defendant to come in and answer were just and reasonable. After an examination of the case, we have concluded that there should be some modification of the order imposing terms. The defendant claims that he paid \$50 in full for interest on the sum to become due on the contract, the day the papers were executed. We think he should not be required to deposit that sum with the clerk, as by the order he must do. Whether that sum was or was not paid as alleged or claimed, will be a proper question for determination on the evidence. It is certainly a controverted point in the case, and may well await the final hearing. It is true, the order provides that this \$50 is not to be paid by the clerk to the plaintiff until the fur-

Magoon vs. Callahan.

ther order of the court; and it is suggested on the part of the plaintiff that this relieves the condition from all objection, and fully preserves the rights of the defendant. But if that sum has once been paid on the contract, it seems to us unjust to require the defendant to again raise the amount to be deposited with the clerk to await the result of the litigation.

The provision in the order requiring the defendant to pay the amount which he admits to be justly due and payable, is correct, except that we are inclined to think the court should allow him until July 1, 1876, to make the payment. Our reason for giving this time is this: If the defendant's version of the transaction is correct, the deed and contract executed on the 6th day of January, 1871, probably constitute a mortgage to secure the payment of a sum loaned. On the foreclosure of a mortgage there is a sale of the property, and a year given to redeem. The defendant should have about that time to make payment, and this he secures by this modification of the order.

Counsel, however, insist that as the defendant satisfactorily excused his default and showed that he had a defense on the merits, he should have been allowed to answer without any conditions. We cannot assent to this proposition. The defense set up in the answer was, that the property conveyed was the defendant's homestead; that he was a married man; and that the deed was void because not executed by his wife. This defense, if sustained, affects the validity of the instruments as securities. And the defendant asks a court of equity to exercise its discretion and enable him to make that defense. And the court merely requires him to pay the money confessedly due and payable as a condition to coming in to avoid and set aside the securities. It is quite analogous to permitting a party, after default, to come in and make the defense of usury, with this difference: here the plaintiff is guilty of no wrong; he may not even have been wanting in proper diligence in taking the conveyance without the signature of the

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

wife; for it does not appear that the defendant's wife lived with him — indeed, the inference from the answer is that she does not, — and the plaintiff consequently may not have known that he was a married man; while in the case of usury the lender is guilty of a violation of law. Still, as a condition of aiding a party against usury, this court has held that it was just and reasonable to require the borrower to pay the principal sum due and interest. *Dole v. Northrop*, 19 Wis., 249; *Jones v. Walker*, 22 id., 220; and *Weber v. Zeimet*, 27 id., 685. According to our view, it was a most reasonable exercise of discretion on the part of the court to require the defendant to pay the amount confessedly due and owing as a condition to allowing him to come in with his proposed defense. Nor do we think this view is in conflict with the decision in *Hanson v. Michelson*, 19 Wis., 499. The leading facts of the two cases are so unlike that they cannot be brought within the application of the same principle. Here the defendant admits that he justly owes the plaintiff \$500, and the interest thereon from January 6, 1872; and every principle of law and all rules of honest dealing require him to pay his debt.

By the Court. — The order of the circuit court is reversed, and the cause is remanded for a modification of the terms imposed, as indicated in this opinion.

HEATH VS. THE SILVERTHORN LEAD MINING & SMELTING
COMPANY and others.

PRIVATE CORPORATION. (1) *Estopped to deny validity of contract made for it by its de facto officers.*

BILLS AND NOTES. (2) *Who protected as purchaser for value.*

PLEDGE. (3) *Pledgee of stock as collateral, not bound to take it in payment.*

(4) *Act of pledgee in voting on such stock, held not a conversion.*

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

JUDGMENT IN FORECLOSURE. (5) *Error to adjudge void a mortgage subsequent to plaintiff's, whose validity is not contested by the mortgagor.*

RULES OF S. C. (6) *What printed case and briefs must contain.*

1. Ch. 258, P. & L. Laws of 1866, in terms constitutes the persons therein named a corporation; and, although the first meeting of the stockholders for the election of officers, etc., and all subsequent meetings, were held outside of this state, their acts constitute an acceptance of the charter; and the company is estopped from denying the validity of contracts entered into by its officers *de facto* on the ground that it could not legally elect such officers and transact business except within the limits of this state.
2. One who takes commercial paper, without notice, in absolute payment of a preëxisting debt, is protected as a purchaser for value; and this, although he purchases for less than the face of the paper, unless the discount is so great as to show *mala fides*.
3. The fact that plaintiff, on purchasing defendant's note and mortgage in suit, took capital stock in the defendant in pledge as collateral security, does not bind him to accept such stock in payment of the note, in the absence of any agreement to that effect.
4. The fact that plaintiff, while holding such stock in pledge, voted upon it at a stockholders' meeting, did not constitute a conversion of the stock by him; especially as it appears that he was requested by the president of the company (who knew that he held the stock as collateral security) to be present at such meeting and vote upon said stock.
5. One H., made defendant with the corporation, alleges that a mortgage of the same premises, executed to him by the officers of the company, was prior to that of plaintiff, and exhausted the power of said officers in that behalf; and asks that the plaintiff's mortgage be adjudged void, and his own the sole valid lien on the premises. The corporation does not contest the validity of the H. mortgage, nor ask any relief against it. Plaintiff's mortgage having been adjudged prior and paramount to that of H., and a judgment of foreclosure and sale having been rendered in his favor, it was error to further adjudge the H. mortgage void for all purposes; and for such error the judgment is reversed, and the cause remanded with directions to enter a proper judgment.
6. The rules requiring the brief on each side to contain a succinct statement of so much of the record as is essential to an understanding of the questions discussed, and the printed case to present an *abstract* of the material matters, will be enforced by a peremptory dismissal of the appeal or writ of error where there is a marked failure to comply with them.

APPEAL from the Circuit Court for *La Fayette* County.

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

Action commenced in 1871, for a foreclosure of a mortgage alleged to have been executed by the *Silverthorn Lead Mining & Smelting Company* in July, 1867, to secure its promissory note to one Law for \$15,000, payable in three years with interest. These instruments are averred to have been transferred and assigned by Law to the plaintiff before due, for value. It is alleged that one Ward, then being the secretary of said company, borrowed said sum of \$15,000 of Law, executed and delivered said note therefor, and also executed and delivered said mortgage under the seal of the corporation; and that he did these acts in pursuance of authority vested in him by a resolution of the board of directors of said company passed at a regular meeting of the board on or about the 16th of July, 1867. It is further alleged that said company was then a corporation existing by virtue of the laws of this state. The other defendants are made such as having or claiming some interest in or lien upon the mortgaged premises; which interest or lien, if any, is alleged to have accrued subsequently and to be subject to the lien of said mortgage.

There were four separate answers; one by the defendant corporation, one by the defendant *Howard*, the third by the defendants *Tallman* and *Knowlton*, and the fourth by the defendant *Charles*. The nature of the defenses relied upon will sufficiently appear from the opinion. Judgment was rendered in favor of the plaintiff; and the defendants appealed.

M. M. Cothren, for appellants:

1. The company was never organized, and the mortgage is void. "All votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the state granting the charter of the corporation, are wholly void." *Miller v. Ewer*, 27 Me., 509; 2 Kent's Com., 224; *Williams v. Storrs*, 6 Johns. Ch., 357; *Bank of Augusta v. Earle*, 13 Pet., 519; *Farnum v. Blackstone Canal Co.*, 1 Sum., 47; *Freeman v. Machias Waterpower & Mill Co.*, 38 Me., 343. 2. The evidence shows that the plaintiff

 Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

was not an innocent purchaser. To entitle himself to protection as such, he should have delivered up all evidences of past indebtedness, and left the mortgage and note in suit as his sole evidence of such indebtedness. Receiving a note for a precedent debt is receiving it for value, within the law merchant, if it be taken in satisfaction of such debt, and the *debt be cancelled*. *Bank of St. Albans v. Gilliland*, 23 Wend., 311. Merely taking a note for a precedent debt is not taking it for value within mercantile usage. *Rogers v. Morton*, 12 Wend., 487; 14 id., 575. Moreover, as a shareholder, plaintiff was legally bound to take notice of everything connected with the affairs of the company. *Miller v. Ewer, supra*. Counsel further argued, upon the evidence, that the plaintiff knew Law to be engaged in defrauding the company, and especially that his holding a large amount of stock which he knew belonged to the company, having it transferred to him on the books, and voting on it, were strong evidence of his complicity with Law. 3. This note and mortgage are void, because the company's agents, before making them, exhausted their authority, by executing the *Howard* note and mortgage.

The cause was submitted for the respondent on the brief of *Frederick Sackett*:

1. If there has been a user of the corporate franchise by an association of persons, their existence as a corporation can be inquired into only by the government. *A. & A. on Corp.*, § 94; *Rice v. R. R. Co.*, 21 Ill., 93; *Tarbell v. Page*, 24 id., 46; *Ill. G. T. R. R. Co. v. Cook*, 29 id., 237; *Baker v. Backus*, 32 id., 79-110; *Smith v. Sheesley*, 12 Wall., 358. An inquiry as to the right of the company to act as a corporation can only be had at the suit of the state on information of the attorney general. *Rondell v. Fay*, 32 Cal., 354; *Baker v. Backus, supra*. Persons in possession and exercise of the corporate rights granted by the charter must be considered rightfully there, even if it was shown that the charter was granted on a precedent condition; for, as against all but the

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

sovereign, the precedent condition shall be taken to be performed. *The Tar River Nav. Co. v. Neal*, 3 Hawks, 520, 534; Abbott's Dig. Corp., 365; A. & A. on Corp., § 739; Herman on Estoppel, §§ 539, 542. 2. Corporations that have permitted particular individuals to take possession of their property, their seal and their records, and to act as their trustees, and have in fact held them out to the world as their trustees, are estopped from questioning the acts of their agents. *Lovett v. Ger. Ref. Church*, 12 Barb., 67; *Zabriskie v. R. R. Co.*, 23 How. (U. S.), 400. In a suit to foreclose a mortgage given by a corporation, the question of the existence of the corporation cannot be raised. Having mortgaged the property, it will not be permitted to deny its own title. *R. & M. R. R. Co. v. Farmers' L. & T. Co.*, 49 Ill., 331. After receiving the money, and giving a mortgage to secure its repayment, the company cannot avoid liability by questioning the authority of the persons making the loan. *Ottawa P. R. Co. v. Murray*, 15 Ill., 336; *Chicago, etc., R. R. Co. v. Howard*, 7 Wall., 392, 413; *Mobile & C. P. R. R. Co. v. Talman*, 15 Ala., 489. If one professes to be authorized to mortgage the property of a corporation, in order to procure a loan, and the money obtained thereby comes to the use of the corporation, and be retained by it, that will be evidence of a ratification of the mortgage. *Despatch Line v. Bellamy Man. Co.*, 12 N. H., 205; *Whitwell v. Warner*, 20 Vt., 425, 449. Nor can a corporation, receiving the benefit of a loan, avoid its liability upon a mortgage given to secure its payment, by denying the authority of those who contracted in its behalf. *Ottawa P. R. Co. v. Murray*, *supra*; Herman on Estoppel, § 542; Bigelow on Estoppel, 466. 3. The directors are the agents of the corporation, and not the corporation itself. Although they meet without the limits of the state creating the corporation, their proceedings will be valid and binding on the company. The directors of a manufacturing company, incorporated without restriction as to the place of holding their meeting, may meet

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

in another state and there appoint a secretary. *McCall v. Byram Man. Co.*, 6 Conn., 428, 430, 432. In authorizing an agent to execute a deed, the directors act as agents of the corporation; and they may confer such authority by a vote passed at a meeting without the state where the corporation was created. *Arms v. Conant*, 36 Vt., 744. When the incorporators meet without the limits of the state granting the charter, and elect a board of directors, which calls for payment upon subscriptions to the company's stock, a subscriber, sued for such call, cannot object to the legality of the election. The parties thus elected are directors *de facto*, and the legality of the election cannot be inquired into collaterally, without showing a judgment of ouster against them in a direct proceeding for that purpose by the government creating the corporation. *O. & M. R. R. Co. v. McPherson*, 35 Mo., 13.

4. The interest of the stockholders, as such, may be legally affected by the action of the company through its officers; but, as between the stockholders and the company itself, touching any claim which they have against it, they stand in the position of a stranger. *King v. R. R. Co.*, 5 Dutch., 82, 91. The members or directors of the corporation may make contracts with it like other persons; and as to such contracts, when made, they stand in the relation of strangers to the corporation. *Stratton v. Allen*, 16 N. J. Eq., 229; *Gordon v. Preston*, 1 Watts, 385; *Revere v. Boston Cop. Co.*, 15 Pick., 351. See also *Am. Bank v. Baker*, 4 Met., 164, 176; *Hill v. Manchester W. W. Co.*, 5 Barn & Ad., 866; 1 Phillipps' Ev., C. H. & E.'s Notes, 368 (449).

5. Where a negotiable note secured by mortgage is passed before maturity, the mortgage passes as incident to it; and they may be enforced by the holder for the full amount in spite of any existing equities between the mortgagor and mortgagee. *Fisher v. Otis*, 3 Chand., 83; *Croft v. Bunster*, 9 Wis., 503; *Cornell v. Hichens*, 11 id., 353; *Crosby v. Roub*, 16 id., 616; *Andrews v. Hart*, 17 id., 297.

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

COLE, J. The counsel for the defendant company insist that the note and mortgage in suit are invalid for the reason that the corporation had no legal existence and no authorized officers or agents to act for and bind it in such contracts when these instruments were executed. No meeting of the incorporators was held in this state for the purpose of choosing directors and organizing the company until after these instruments were executed, and on that ground it is claimed they are null and void. The records of the company show that the first regular meeting of the board of directors created by the charter was held at Shullsburg, Wisconsin, at which a majority of the incorporators were present, and an organization of the company effected, and that then the meeting was adjourned to meet in Chicago. But it satisfactorily appears from the evidence that no such meeting was in fact held, and that the first meeting of the stockholders for the election of officers and the organization of the company was actually held at Chicago, October 2, 1866, and that all subsequent meetings for the transaction of business were held in that city. And the counsel for the company, to show that the note and mortgage are void, refer to and rely upon the well settled rule of law that a private corporation whose charter has been granted by one state cannot regularly hold meetings, pass votes and exercise powers in another state. The case of *Miller v. Ewer*, 27 Maine, 509, is cited in support of the position that "all votes and proceedings of persons professing to act in the capacity of corporators, when assembled beyond the bounds of the state granting the charter of the corporation, are wholly void." It is true this case so holds; but at the same time it recognizes a rule of law which is sanctioned by numerous authorities, and which is certainly in accord with the principles of natural justice, that when a corporation has "held certain persons out to the public as its directors or officers, those dealing with them as such, and ignorant of their want of legal power, will be entitled to consider their acts as binding upon

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

the corporation; and when there has been an informal or irregular exercise of an existing power of election, the officers so elected, until removed, are regarded as officers *de facto*, and their acts are obligatory upon the corporation." p. 524. In determining the question as to the validity of the note and mortgage, it is apparent that the distinction between what is sufficient to constitute a corporation *de facto*, and what is necessary to constitute one *de jure*, must be regarded, and the circumstances under which a *de facto* corporation will be estopped from denying its existence as against a stranger dealing with it. It may well be that the election of a board of directors at the first meeting held outside the limits of the state was irregular and not warranted by the charter, and yet the corporation may not be in a position to take advantage of the irregularity in this action upon these contracts.

The act of incorporation (ch. 258, P. & L. Laws of 1866) provides that Richard S. Law and four other persons named, their associates, successors and assigns, should be, and they were by the act, constituted a body corporate and politic by the name of the "Silverthorn Lead Mining and Smelting Company"; and by that name were authorized to sue and be sued; to have a common seal; to enjoy the rights and privileges incident to corporations for mining, smelting and manufacturing lead ore and other metals in this state; with power to purchase, hold, lease and convey real estate not exceeding in value \$1,000,000, and personal property to the amount of \$200,000. The capital stock of the company was fixed at \$3,000,000, and was to be divided into shares of such amount as the board of directors might determine, transferable as should be prescribed by the by-laws; the affairs, business and property of the corporation to be managed by a board of directors of not less than five, to be elected at the annual meeting of the stockholders, the board to choose one of their number president, and they could appoint a secretary, treasurer and other officers as they might deem expedient; had power to adopt by-laws for the govern-

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

ment of the company, and by a resolution were authorized to locate the principal office or place of business of the company. Until the first annual meeting of the stockholders called for the purpose of electing directors, and until such directors were elected, the corporators named were constituted directors, and might exercise all the powers conferred upon the board of directors. Then further powers were conferred upon the corporation, not necessary to be alluded to. It will be observed, however, that the act names the corporators and declares them incorporated, without any preliminary steps whatever, and constitutes the corporators the board of directors of the company. In other words, the charter *ipso facto* brings *in esse* a corporation so far as was possible for the legislature to create a private corporation. In October, 1866, the stockholders met in Chicago, and elected a board of directors, and organized the corporation. At subsequent meetings held in that city, the board adopted a code of by-laws for the government of the company, and procured a corporate seal; sold large amounts of the capital stock; acquired real estate for mining purposes; caused mining leases of portions of the same to be executed; and prosecuted extensive mining operations. In July, 1867, by a resolution adopted by the board of directors, the president and secretary, or either of them, were authorized to borrow \$15,000 in the name of and for the use of the company, at a rate of interest not exceeding ten per cent. for three years; and to secure the payment of the loan, either of said officers was empowered to execute under the corporate seal, acknowledge and deliver in the name of the corporation, a mortgage upon its real estate, and at the same time to execute and deliver a promissory note with the mortgage, and as a collateral security to pledge certificates representing 7,000 shares of the stock of the company. A note and mortgage were executed in pursuance of this resolution, and delivered, as is claimed by the plaintiff, to Richard S. Law, the mortgagee therein named, to secure the payment of a loan of \$15,000. There is no dis-

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

pute about these various acts showing an acceptance and user of the rights and franchises granted by the charter, and the question is, Can the corporation repudiate its contracts on the ground that its officers who executed them on its behalf were chosen at a meeting held beyond the limits of this state? If this were a case of first impression, we should say upon principle the company was estopped from availing itself of any such defense to defeat a recovery on its contracts; but the cases cited in the brief of counsel for the plaintiff show that such a view is amply sustained by authority. These cases will not be particularly referred to in this opinion, but they will be found fully to sustain the proposition that where a company has assumed to exercise the franchises conferred by its charter as this has done, it becomes a corporate body *de facto*, and the acts of its officers are binding upon the corporation. The company ought not to be permitted to say, in defense of an action upon its contracts entered into under such circumstances, that it had no legal existence when the contracts were executed, or that its officers were not duly elected or appointed. We have commented upon the fact that the charter created a private corporation so far as it was possible for the legislature to bring one *in esse*, and constituted the corporators a board of directors without further action. Our conclusion upon this point, therefore, is, that though the first meeting of the stockholders to elect directors was held in Chicago, this fact does not render the note and mortgage void as against the corporation.

Again, it is said the plaintiff is not an innocent purchaser of the note and mortgage for value, and consequently is chargeable with all equities existing between the mortgagee, Richard S. Law, and the corporation. The plaintiff derived title to these securities from Law, who acted as superintendent and general managing agent of the business and affairs of the corporation. The note and mortgage were executed and delivered to Law for the purpose, as expressed upon the face of

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

the instruments, of securing to him the payment of \$15,000 which he had loaned the company. It is said that Law really made no loan to the company and gave no consideration for the securities, and furthermore that he had been guilty of a fraud in his dealings with the company in that he falsely represented that he had paid Dr. Lee \$25,000 for a tract of land purchased of him, and had a credit for that amount in his account rendered, when in fact he had paid only \$10,000. It is not deemed necessary to examine the testimony in detail for the purpose of seeing whether it warrants any such conclusions from the facts proven. It is sufficient to say, whatever may be the exact state of the account between Law and the company, and whatever may be the truth in regard to the alleged fraud, that the note and mortgage purport to have been given for a loan of \$15,000 made when they were executed; and there is not a fact or circumstance shown which would charge the plaintiff with either actual or constructive notice of any existing equities between the original parties, or of any infirmity in Law's title. It is the settled rule of this court, that a negotiable promissory note, secured by a mortgage, stands upon the same footing as other negotiable paper, and that an innocent purchaser thereof before maturity is to be protected. *Croft v. Bunster*, 9 Wis., 503; *Cornell v. Hichens*, 11 id., 353; *Crosby v. Roub*, 16 id., 616; *Andrews v. Hart*, 17 id., 297; *Bange v. Flint*, 25 id., 544. So that the case, so far as the question of consideration is concerned, comes within the familiar principle that a sufficient consideration of the note and mortgage as between Law and the company must be conclusively presumed. It is said that when Law was first introduced to the plaintiff sometime in 1867, it was not as a money lender, but as a borrower, and that this circumstance was sufficient to create suspicion or to put the plaintiff upon inquiry in regard to Law's title. But we can attach no such significance to that fact. The fact that a person wishes to borrow

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

money does not tend to prove that he might not have had money to loan but a short time previously.

But it is further objected that the plaintiff is not a purchaser for value. It appears that the note and mortgage were first placed in the plaintiff's hands as collateral security for the payment of notes given by Law for moneys loaned him by the plaintiff, and also to indemnify the plaintiff against loss on paper he had indorsed for Law. In the spring of 1868, the plaintiff became the absolute purchaser of the note and mortgage by paying an additional sum of \$1,500, and by discharging Law's indebtedness, amounting to over \$7,000, and delivering up Law's notes and securities which he held for their payment. The amount of such securities is not disclosed in the testimony. But still the facts show that the plaintiff is a purchaser for value within the rule. When the holder takes paper without notice, in absolute payment of a preëxisting debt, and surrenders a prior note or other security held for such debt, that is a good purchase for value and entitles him to protection. *Stevens v. Campbell*, 13 Wis., 376. And it is the same although purchased for less than the face of the paper (*Bange v. Flint, supra*), unless the discount is so great as to be of itself evidence of *mala fides*. *De Witt v. Perkins*, 22 Wis., 473. Nothing of the kind can be said in this case. The discount, though considerable, is probably not greater than is sometimes made on securities of that class in the market or in the usual course of business. There was also pledged as collateral security for the payment of the note and mortgage, 7,000 shares of the capital stock of the company. It is claimed that the plaintiff is bound to accept this stock at the rate of three cents on the dollar of its par value in payment of the amount due him. It is not shown that there was any agreement or understanding to that effect between the parties, and in the absence of such an agreement we know of no principle of law which compels him to purchase the stock. The

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

stock doubtless belongs to the corporation after the mortgage debt is paid. It is also suggested that the plaintiff has converted the stock to his own use, because he voted upon it at some of the meetings for the election of directors. We do not think that act was attended with any such consequences. It is clear that the plaintiff had the right to retain possession of the stock. The president of the company testifies that he knew that the plaintiff held stock as collateral security for the payment of the mortgage debt; and he practically admits that he requested the plaintiff to be present at the stockholders' meeting in November, 1870, and vote upon his stock. But even if the act were unexplained, yet we are unable to perceive any ground for saying that voting upon the stock under the circumstances amounted to a conversion of it.

Moreover it is insisted that the note and mortgage are void because the officers of the corporation had exhausted their power by executing to the defendant Howard the precise note and mortgage contemplated in the resolution authorizing them to act. The answer to this objection is, that the overwhelming weight of testimony shows that the Howard mortgage is subsequent in date and inferior in equity to the plaintiff's mortgage — even if it has any validity whatever. But we do not enter upon the consideration of the question whether or not the Howard mortgage is a valid lien, because the pleadings do not raise that issue. In his answer Howard asks that the plaintiff's mortgage be adjudged null and void, and that his mortgage be declared the only valid lien upon the premises. The corporation does not contest the validity of the Howard mortgage, nor seek any relief in respect to it. The only question therefore is, whether the lien of the Howard mortgage is prior and paramount to the lien of the plaintiff's mortgage; and upon that question we have indicated the view that it was not. On the pleadings and evidence, the court should have entered the usual judgment of foreclosure of the plaintiff's mortgage, and ordered a sale of the mortgaged premises.

Heath vs. The Silverthorn Lead Mining & Smelting Company and others.

The court, however, not only granted that relief, but also proceeded to adjudge the Howard mortgage null and void for all purposes whatever, thus clearly going beyond the issues in the case. The judgment of the circuit court, for this error, must therefore be reversed: and the cause must be remanded to that court with directions to enter a judgment in conformity to the prayer of the complaint.

We cannot take leave of this case without expressing our great dissatisfaction at the manner in which it has been presented for our consideration. The rules require the briefs on both sides to contain a succinct statement of so much of the record as is essential to an understanding of the questions discussed. Of course, there should not only be a statement of the substance of the pleadings when questions arise upon them, but also of the leading facts established by the evidence where questions of fact are to be determined. In this case there was a great neglect or failure to conform to the rule in that regard. The printed case likewise contains much immaterial matter, and might and should have been greatly abridged and condensed. It is quite impossible for this court to transact the business coming before it without an observance by the bar of the rules, in the preparation of their briefs and cases. It is painful for the members of the court to recur so frequently to this subject as they have been compelled to do. And it might as well be understood that in the future we shall enter upon the examination of no case where the failure to comply with the rules is so marked as in this case, but shall peremptorily dismiss the appeal or writ of error.

By the Court. — The judgment of the circuit court is reversed, and the cause is remanded with directions to enter the proper judgment of foreclosure as above indicated.

Wilson vs. The City of Mineral Point and another.

WILSON VS. THE CITY OF MINERAL POINT and another.

INJUNCTION: TRESPASS: DESTRUCTION OF FRUIT AND ORNAMENTAL TREES. (1) *When injury irreparable, and when enjoined.* (2) *Threatened destruction of fruit and ornamental trees by city and its street commissioner, held ground for injunction against both.* (3) *Right to damages not decided.*

1. An injury is *irreparable*, and will be enjoined, if of such a nature that it cannot be adequately compensated in damages, or cannot be measured by any certain pecuniary standard.
2. The complaint alleges that plaintiff owns certain lots in the defendant city, upon which his dwelling house is situate, which are enclosed with fences, and entirely surrounded by what purport to be public streets, and have growing upon them many fruit and ornamental trees and much shrubbery, of several years' growth and of great value, greatly enhancing the value of the lots; and that such lots have been so enclosed for twenty-five years; and it alleges facts showing that, unless enjoined, the street commissioner of said city (who is also made a defendant) will, by order of the common council, destroy said fences, on the ground that they encroach upon the public streets, and will dig up and destroy many of said fruit and ornamental trees, and expose the remainder to be destroyed for want of fences, which, it is alleged, will be to plaintiff's "great and irreparable damage." It is further alleged, that said fences do not encroach upon the public streets, and that the defendants have no right to do the acts threatened. Prayer, for an injunction and for damages. *Held*, on demurrer,
 - (1) That the complaint states a good ground for an injunction against both defendants.
 - (2) That there is no misjoinder of causes of action, nor defect of parties.
3. Whether the complaint states a cause of action for damages, is not decided.

APPEAL from the Circuit Court for *Iowa* County.

The complaint alleges that plaintiff is the owner in fee and in actual possession of certain lots in the defendant city, on which his dwelling house is situated; that the lots are inclosed with fences, and entirely surrounded by what purport to be public streets; that standing and growing upon such

Wilson vs. The City of Mineral Point and another.

lots are a great many fruit and ornamental trees and much shrubbery of several years' growth and cultivation, and of great value, and which greatly enhance the value of the lots; and that such lots have been so inclosed for twenty-five years. It further alleges that the authorities of the defendant city claim that such fences encroach upon the public streets; that the common council of the city has ordered the defendant *Weidenfeller*, who is the street commissioner thereof, to remove all obstructions from the streets unless the persons encroaching upon the streets remove the same within a specified time; and that such commissioner threatens to, and, unless restrained by the court, will destroy the plaintiff's said fences, and will dig up and destroy many of his said fruit and ornamental trees, and expose the balance thereof to be destroyed for want of fences, to his "great and irreparable damage." It further alleges that such fences do not encroach upon the public streets of the city, and that the defendants have no right to remove the same or to dig up or destroy the plaintiff's trees, etc. Prayer, for a perpetual and also a temporary or provisional injunction, restraining the defendants from doing the threatened mischief, and for damages and costs.

The defendants demurred jointly to the complaint, on the grounds, 1. That there is a defect of parties defendant; 2. That several causes have been improperly united; and, 3. That the complaint does not state facts sufficient to constitute a cause of action.

The demurrer was overruled; and the defendants appealed.

M. M. Cothren, for appellants:

It appears on the face of the complaint that the defendant *Weidenfeller* has no interest whatever in the action, being only the agent of the city, appointed under its charter. Sec. 16, ch. 237, Laws of 1873. The municipality alone is liable to respond in damages for injuries to persons or property caused by its officers or agents in making public improvements. *Squiers v. Neenah*, 24 Wis., 588; *Harper v. Mil-*

Wilson vs. The City of Mineral Point and another.

waukees, 30 id., 366; Dillon on Munic. Corp., §§ 766, 769, and cases cited in notes to secs. 772, 778, 789; P. & L. Laws of 1857, chaps. 5 and 6, p. 215; Laws of 1873, chaps. 4 and 5, p. 525. 2. That the complaint does not state a cause of action because it does not allege any title in the plaintiff to the land which the city proposes to open and improve as a part of its public streets. Upon this point counsel argued at length, (1) That the complaint does not directly allege that plaintiff has, or that the city has not, title to the particular land in dispute. (2) That the fences spoken of are not alleged to have been maintained where they are for twenty years *by the plaintiff and his grantors*, or by any other person adversely to the city; nor does it appear that they were not erected and maintained by the city for its own purposes. (3) That if said land was included in the public streets as originally platted, the city acquired not the title but an *easement* only, and there could be no adverse possession of an easement. (4) That it appears from the complaint that the public have been in possession of all the streets bounding plaintiff's lots, *for at least a part of their width*, during the whole period; and that the public are not bound to repair and keep in repair a street for its whole width, unless that is necessary for the accommodation of public travel, and by their neglect to repair for the entire width they lose no right to the part not repaired. Dillon on Mun. Corp., § 527.

The case was submitted for the respondent on the brief of *Wilson & Jones*, who contended, 1. That there was no defect of parties. R. S., ch. 122, sec. 22; 17 N. Y., 592; 26 Wis., 215, 540; 29 id., 515. 2. That there was no misjoinder of causes of action. The cause of action is an alleged injury suffered by plaintiff from defendants' threats to destroy his property. The causes of action are not increased by plaintiff's asking for an injunction; nor does this affect his right of action. 3. That the facts stated constitute a cause of action. When great and irreparable damage is likely to occur from

Wilson vs. The City of Mineral Point and another.

threatened trespass, it is better to begin suit and stay the trespass, than to permit it to be committed and afterwards sue for damages; and the courts will enjoin in such cases. Kerr on Injunctions, 295. 4. That where a complaint states a cause of action against one or some of several defendants, a joint demurrer by all the defendants for insufficiency of facts, or for a defect of parties, can not be sustained. *People v. Mayor of N. Y.*, 28 Barb., 240. 5. That a highway or street may be lost by nonuser and adverse occupancy. Washb. Eas., 640, 642; *Yeakle v. Nace*, 2 Whart., 123; 16 Wend., 631; 22 Vt., 48; 29 Barb., 396; 12 N. Y., 2; Dillon on Mun. Corp., § 529 and note, and § 533. 6. That the erection of a fence upon a street is a positive denial of the rights of the public (*Jones v. Davis*, 35 Wis., 376), and the complaint shows sufficiently a continuous adverse possession; especially as it is to be construed, under the code, liberally, with a view to substantial justice between the parties. R. S., ch. 125, sec. 21.

LYON, J. It is sufficiently averred in the complaint that the defendant *Weidenfeller*, acting under the authority and orders of the regularly constituted authorities of the defendant city, is about to destroy fences, fruit and ornamental trees and shrubbery standing and growing upon premises owned by the plaintiff and occupied by him as his residence and homestead; that the pretense for so doing is that such fences, trees and shrubbery are within the limits of public streets; but that such pretense is unfounded in fact, and the defendants have no lawful authority to do the threatened acts.

On the facts averred it is clear that the plaintiff is entitled to an injunction as prayed in the complaint. It is quite true that the courts will not interfere by injunction to restrain the committing of a mere trespass, for which, if committed, the recovery of damages in an action at law would be an adequate remedy. It is also true that the courts will interfere by injunction and prevent a threatened injury, which, if inflicted, will be irreparable.

Wilson vs. The City of Mineral Point and another.

An injury is irreparable when it is of such a nature that the injured party cannot be adequately compensated therefor in damages, or when the damages which may result therefrom cannot be measured by any certain pecuniary standard. High on Injunctions, § 460 and cases cited. It is said by Judge Story that "if the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But now there is not the slightest hesitation, if the acts done or threatened to be done to the property would be ruinous or irreparable, or would impair the just enjoyment of the property in future." 2 Eq. Jur., § 928.

That the threatened injuries which this action was brought to prevent, would, if inflicted, be *irreparable*, in the legal acceptance of that term, and would greatly impair the just enjoyment of the plaintiff's property, is perfectly well settled. No one will seriously contend that a money compensation is an adequate remedy for the loss of the trees and shrubbery which the complaint avers the defendants threaten to destroy; and it would be a denial of justice were the courts to refuse the plaintiff the protection he asks, and thus permit his home to be permanently despoiled. See High on Injunctions, § 467 and cases cited.

We think the complaint states a cause of action against both defendants, and that there is no misjoinder of causes of action, and no defect of parties. We do not decide whether or not the complaint states facts sufficient to entitle the plaintiff to recover damages, but only, that if the averments therein contained are true, he is entitled to the injunction prayed.

By the Court.— Order affirmed.

Hopkins vs. Hopkins. (First Appeal.)

HOPKINS vs. HOPKINS. (First Appeal.)

Presumption on Appeal.

On appeal from a judgment of divorce, where there was no appearance in the trial court by the defendant before judgment, and no bill of exceptions, this court cannot review the evidence (taken before a referee); and, if the complaint states a good ground for divorce, must presume that the evidence was sufficient to sustain it.

APPEAL from the Circuit Court for *Dodge* County.

A. Scott Sloan, for appellant.

Submitted for the respondent on the brief of *H. W. Lander*.

COLE, J. This is an appeal from a judgment of divorce. The defendant, though personally served with summons, made no appearance in the action. His counsel now claims that the evidence taken before the referee did not warrant a divorce from the bond of matrimony. Whether it did or not we cannot determine, because the evidence is not before us for review. There is nothing brought up on the appeal but the record proper, which does not include the report of the referee who took the testimony upon which the divorce was granted. *Krause v. Krause*, 23 Wis., 354. The complaint certainly states a good ground for a divorce; and we must presume that the matters alleged were established by sufficient and satisfactory evidence. And, as there is no error upon the record, the judgment of the circuit court must be affirmed.

By the Court. — Judgment affirmed.

Hopkins vs. Hopkins. (Second Appeal.)

HOPKINS vs. HOPKINS. (Second Appeal.)

Superfluous Appeal.

1. A party ought not to be permitted to bring two appeals to obtain that which he can obtain, if at all, upon one.
2. Defendant's appeal from an order refusing to set aside or modify a judgment of divorce, is dismissed, for the reason that he has also appealed from an order denying a subsequent motion to set aside or modify the same judgment, covering the ground of the first motion as well as additional ground.

APPEAL from the Circuit Court for *Dodge County*.

A. Scott Sloan, for appellant.

Submitted for the respondent on the brief of *H. W. Lander*.

COLE, J. This is an appeal from an order dated January 15, 1875, refusing to set aside or modify the judgment of divorce in certain particulars on the application of the defendant. At a subsequent day the defendant made another motion to set aside the judgment, or for a modification of its provisions, covering the same ground as that embraced in the first motion, as well as additional ground. He has likewise taken an appeal from the second order, which is disposed of at the same time with the present one.

It is very apparent that a consideration of the first order is wholly unnecessary. The defendant can obtain all the relief to which he is entitled on the appeal from the second order. And this appeal will therefore be "dismissed upon the ground that a party ought not to be permitted to bring two appeals to obtain that which he can obtain, if at all, upon one." *Young v. Groner*, 22 Wis., 205.

By the Court. — Appeal dismissed.

Hopkins vs. Hopkins. (Third Appeal.)

HOPKINS vs. HOPKINS. (Third Appeal.)

DIVORCE: CUSTODY OF CHILDREN. ALIMONY. (1) *Collusion between husband and wife to procure divorce, a fraud upon the court.* (2) *Effect of husband's agreement not to oppose divorce, not decided.* (3) *Burden of proof on party seeking to set aside divorce.* (4) *Courts limited to statutory powers in divorce cases.* (5) *Court can not give custody of children to stranger.* (6) *Amount of alimony.*

1. A collusive agreement between husband and wife to procure a divorce when no breach of matrimonial duty had been committed, would be a fraud upon the court.
2. Whether an agreement by the husband not to oppose the granting of the divorce to the wife, and to pay a stipulated sum for alimony, would be a fraud upon the law, and a sufficient ground for setting aside the divorce, is not here decided.
3. One who seeks to have a judgment of divorce set aside upon the ground of fraud or collusion in procuring it, has the burden of proof; and in this case the proof is insufficient.
4. Courts of law or equity in this country, in matters of divorce, have only the power conferred on them by statute.
5. In actions for divorce, courts of this state have no authority to take the custody and control of the child from both parents, and give it to a stranger.
6. It appearing that defendant's property is worth only \$7,575, and that his income is small and uncertain, this court regards an award of \$3,000 alimony to the plaintiff as excessive, although defendant once offered to pay that amount; and it directs the judgment to be modified so as to award only \$2,000.

APPEAL from the Circuit Court for *Dodge County*.

This was an action for divorce brought by the wife against the husband, in which judgment was had by default. Defendant made two several motions to set aside or modify the judgment as to the custody of the children, and on the ground of excessive alimony. The facts are stated in the opinion. Both motions were denied; and the present appeal is from the second motion, dated April 23, 1875.

Hopkins vs. Hopkins. (Third Appeal.)

A. Scott Sloan, for appellant:

1. The judgment should be set aside for fraud and imposition on the court in using its process to effect a fraud on defendant. *Johnson v. Coleman*, 23 Wis., 452, 454; *Edson v. Edson*, 108 Mass., 590; *Adams v. Adams*, 51 N. H., 388. Defendant made an agreement with plaintiff's attorney as to the amount of alimony and disposition of the children, and this agreement is not disputed. Relying on plaintiff to carry out its terms, defendant made no defense to the action; and plaintiff obtained the judgment contrary to such agreement. 2. The judgment should also be set aside for collusion. Bishop on M. & D. (4th ed.), § 761; Freeman on Judgments, § 250. The evidence shows that the parties collusively agreed to a divorce, and the terms thereof. Such agreement was against the policy of the law, and should not be sustained, especially when one of the parties, by means thereof, has gained an undue advantage over the other. 3. The amount of alimony is excessive. *Williams v. Williams*, 29 Wis., 517; *Moul v. Moul*, 30 id., 203. 4. It is proper practice to proceed by motion to set aside or modify the judgment. Divorce cases, in this respect, are governed by the same rules as other cases. *Edson v. Edson*, 108 Mass., 591; *Weatherbee v. Weatherbee*, 20 Wis., 500.

The cause was submitted for the respondent on the brief of *H. W. Lander*, who contended, 1. That the allowance of \$3,000 for alimony was proper, since this was the defendant's own offer, and he knew the situation of his property and how much he was able to pay. 2. That the circuit court had the undoubted right, under the statute, to change the custody of the children. R. S., ch. 111, secs. 19, 20.

COLE, J. The moving papers used in support of the second rule to show cause why the judgment of divorce should not be vacated, or modified in certain particulars, present, as it seems to us, no case for setting aside the judgment. It is

Hopkins vs. Hopkins. (Third Appeal.)

claimed that the affidavits show that the judgment was obtained in pursuance of a collusive agreement, or by fraud and imposition practiced upon the defendant. But this position is clearly not sustained by anything found in the record. It is true, the defendant states in substance, in his affidavit, that at the time the action was commenced, he was sick and unable to attend to business; that he put in no answer and entered no appearance in the cause; that he saw the attorney of the plaintiff by the appointment of such attorney, and entered into an agreement with him concerning the suit and the amount of alimony which was to be paid the plaintiff upon the divorce being granted, and also in respect to what articles of personal property or household furniture the plaintiff should receive; and that he then agreed not to oppose the granting of a divorce. But all this is flatly contradicted by the plaintiff in her affidavit, who positively denies that she ever made any agreement or had any understanding with the defendant of any kind in reference to the suit, or in respect to the amount of alimony which she was to receive, or in regard to the custody of the children; and she expressly denies that she ever authorized her attorney or any other person to make any agreement or to have any understanding concerning the action, except as stated by her in a subsequent part of her affidavit, which is not material on this point. The burden of proving the fraud or collusive agreement was upon the defendant; and it is certainly impossible to say that he has established the fact that he was in any wise imposed upon, or that any collusive agreement was entered into in respect to the divorce. We are therefore relieved from considering the question whether an agreement not to oppose the granting of a divorce, and to pay a stipulated sum for alimony, would amount to a fraud upon the law, and constitute a sufficient ground for setting aside the divorce. It is sufficient to say that no such case has been established by the evidence; nor have any circumstances been shown from which fraud in respect to the divorce can be inferred. As a

Hopkins vs. Hopkins. (Third Appeal.)

matter of course, a collusive agreement between the parties to procure a divorce when no breach of matrimonial duty had been committed, would be a fraud upon the court and could not be sanctioned. But that is not the case before us; and therefore the application to set aside the judgment may be dismissed with the remark that no reason whatever was shown for granting that relief.

The original judgment of divorce was, however, modified in some of its provisions. The court ordered that the custody of the boy, Emery E. Hopkins, which was awarded the plaintiff, should be given to the defendant. No complaint is made of this modification of the judgment. The court further ordered that the custody of the daughter, Rosa Ann Hopkins, which had been originally given to the plaintiff, should be taken from both parents and awarded to Andrew Willard, who was appointed her guardian for a year, and was entrusted with the care and control of her person, and with her education and support, under the direction of the court; and the defendant was ordered to pay the guardian \$250 a year for the support and education of the daughter. It seems to us the court had no authority, in this action for a divorce, thus to take the custody and control of a child from both parents and give it to a stranger. The statute provides that the court, upon adjudging a divorce, may make such further judgment as it shall deem just and proper concerning the care, custody and maintenance of the minor children of the parties, and may determine with which of the parties the children, or any of them, shall remain, having due regard to the age and sex of such children. Sec. 19, ch. 111, R. S. The court is authorized, on the petition of either of the parties, to revise and alter such judgment concerning the care, custody and maintenance of the children, or any of them, and make a new judgment concerning the same, as the circumstances of the parents and the benefit of the children shall require. Sec. 20. The statute evidently contemplates that the care and custody of the

Hopkins vs. Hopkins. (Third Appeal.)

children shall be awarded to one or both of the parents, due regard being had to the age and sex of the children, and to the character, occupation and circumstances of the parent or parents. *Welch v. Welch*, 33 Wis., 534. It is a general principle of the law of divorce in this country, that the courts, either of law or equity, possess no powers except such as are conferred by statute; and therefore authority for the action of the court in that class of cases must be found in the statute, and cannot be looked for elsewhere. *Barker v. Dayton*, 28 Wis., 367. In a proceeding for the appointment of a chancery or probate guardian, where the statutory or general jurisdiction of the court is invoked, it may be competent for the court to take the care and custody of an infant from either or both of the parents, and award it to a third person; and this is sometimes done when the welfare of the child will thereby be subserved. But that is a different proceeding, calling into exercise larger power and discretion than the proceeding before us. Here the power and discretion of the court to award the care and custody of the children are limited to the parents; and to one or the other should the custody of Rosa Ann Hopkins have been given. We are unable to say, upon the evidence before us, that either parent is unfit to be entrusted with that charge; but this matter will be remitted to the circuit court for the exercise of its discretion in view of all the circumstances. If the care and custody of the daughter shall be awarded to the mother, then the defendant should be ordered to pay the plaintiff such a sum for her support as may seem just and proper.

The court likewise modified the judgment in respect to the household furniture and other articles awarded the plaintiff. No serious complaint is made of the judgment as it now stands in that regard, and we are inclined to think it is right. The court awarded the plaintiff \$3,000 alimony, which we consider an undue proportion of the husband's estate. The defendant has made a statement of the property which he owned

when the suit was commenced and the judgment entered, and has affixed to it a valuation which amounts in the aggregate to the sum of \$7,575. The decided weight of testimony tends to show that this is a fair valuation of his property, and the income or profits of his business seems to be small and rather uncertain. In view of these facts we think the sum of \$2,000 is all the defendant should be required to pay for alimony. This is about the proportion of the husband's estate which this court has awarded, so far as any rule can be deduced from the cases decided. *Cole v. Cole*, 27 Wis., 531; *Moul v. Moul*, 30 id., 203; *Williams v. Williams*, 36 id., 362. The defendant will be required to pay the costs of these appeals in this court, and also the costs in the court below. The payment of the \$2,000 alimony can be ordered and arranged by the court so as not to be unduly burdensome upon the defendant.

The counsel for the plaintiff lays stress upon the fact that the defendant had offered to pay \$3,000 as alimony, and insists that he should be held to his offer. But under the circumstances we do not feel inclined to attach much importance to the proposition. The evidence shows what the defendant is worth, and his ability to earn money, and upon that evidence alimony is awarded.

It follows from these views that the order of April 23, 1875, must be reversed, and the cause must be remanded to the circuit court, with directions to modify the original judgment of divorce so as to conform to this opinion.

By the Court.— It is so ordered.

Yates vs. Shepardson. (Cross Appeals.)

YATES VS. SHEPARDSON. (Cross Appeals.)

PRACTICE. (1, 4) *Trial by referee. Exceptions to his findings. (2) Res adjudicata. (3) Waiver of objections to defect of parties and misjoinder of causes.*

EVIDENCE. (5) *Note and receipt on settlement construed: their effect as evidence. (6) Check not evidence of loan from drawer to payee.*

ACCOUNT: INTEREST: OFFSET. (7) *Interest on account. Offsetting account against note.*

1. Where a case has been referred for trial, the report of the referee is final as to any finding of fact not duly excepted to.
2. On a former appeal from the order of the circuit court setting aside the referee's report, upon plaintiff's exceptions thereto, and ordering another reference, this court reversed the order, on the ground that "the circuit court should have reviewed the report, and the questions of law and fact arising upon the exceptions," and that it had not done so; and the cause was remanded "for the action of that court upon the report and exceptions." *Held*, that the questions raised by such exceptions are not *res adjudicatae* by virtue of such former decision.
3. The action being for the balance of mutual accounts, one of the items was for services rendered by a law firm of which plaintiff was a member, and no assignment of the claim to him was shown. No objections were taken to the item, either by demurrer or answer, on the ground of a defect of parties plaintiff or a misjoinder of causes of action. *Held*, that such objections were *waived*.
4. The referee having rejected such items, and defendant having excepted merely to his failure to allow \$150 therefor, the court erred in allowing more than that sum.
5. Upon a settlement between the parties, in 1849, plaintiff gave defendant his promissory note, in the usual form, for \$682.07, and took defendant's receipt, as follows: "Received of *Peter Yates*, on settlement, one dollar in full of all demands except a note of even date of \$682.07 and the rat trap." Plaintiff claims that the note represents advances made by defendant on account of a certain engine, here called the "rat trap;" that the agreement was, that payment should be made only out of the profits thereof; and that there were no profits. Defendant claims that the note was given unconditionally for the balance due him on the settlement. *Held*,

(1) That the note is in terms an unconditional promise to pay; and the legal effect of the receipt is the same as though it had specified that the note was given defendant in full settlement of all the business trans-

actions of the parties, except those growing out of the engine adventure.

(2) That the other evidence being balanced (consisting solely of the conflicting testimony of the parties), and the burden of proof being upon the plaintiff, he must be held liable for the amount due on the note by its terms.

6. A check drawn by one party in favor of the other, and paid to him, is of itself no sufficient evidence that the sum therein named was a loan from the drawer to the payee.
7. Interest not being allowable on plaintiff's account before the action was commenced (*Marsh v. Fraser*, 37 Wis., 149), such account cannot be made an offset as of an earlier date against his obligations to defendant, which drew interest by their terms; but interest on the full amount of such obligations, at the rate mentioned therein, must be computed in the first instance to the commencement of the action. And plaintiff was entitled to interest at the statutory rate, between the commencement of the action and the date of the referee's report, on the balance found to have been due him at the former date.

APPEALS from the Circuit Court for *Milwaukee* County.

These appeals were submitted by both sides upon briefs.

E. Mariner, for the plaintiff.

Carpenter & Murphey, for the defendant.

LYON, J. These are cross appeals from a final judgment rendered by the circuit court in favor of the defendant for \$334.07, upon the report of a referee as modified by that court. The action was commenced February 22, 1868, and involves the necessity of stating an account between the parties of quite large business transactions, covering a period of nearly twenty years. These accounts were kept very loosely; indeed it is not perceived how the parties could well have confused them more, or rendered a satisfactory adjustment of them more difficult. The case is still further complicated by the fact that the testimony of the parties, which covers the whole account of each, is very conflicting, and, looking to the record alone, it is difficult to say which of them recollects most accurately the transactions involved in this litigation. To state

Yates vs. Shepardson. (Cross Appeals.)

the account with mathematical accuracy is, under the circumstances, an impossibility. Because of their gross and persistent carelessness, neither party has any right to complain, however the action may result.

The case has been examined with great care; indeed, we fear that we have given more time to such examination than we ought, in view of other pressing and important official duties. Upon many points the testimony leaves our minds in much doubt and uncertainty; yet, with the aid of such lights as the record gives us, we will endeavor to state the accounts of the parties upon legal principles, and strike the balance between them. No extended discussion of mere questions of fact will be inflicted upon the profession, but this opinion will be confined to brief discussions of questions of law arising in the case (and these are not numerous), and to statements of our conclusions on questions of fact.

The report of the referee, before whom the case was tried, is final as to any fact found by him to which no exception was taken. Such report will, therefore, be taken as the basis of our investigations, and no objections now made to such findings will be considered unless presented by proper exceptions.

And here a preliminary objection may as well be disposed of. The circuit court once made an order setting aside the report of the referee and ordering another reference, upon exceptions to the report, taken by the plaintiff. On appeal to this court, the order was reversed. Counsel for the defendant now insists that by the decision and judgment of this court on such appeal, all the plaintiff's exceptions are *res adjudicata*, and hence, that the circuit court could not properly modify the report. The position is not well taken, as plainly appears by the following extract from the opinion of this court on reversing such order: "The circuit court, we think, should have reviewed the report, and the questions of law and fact arising upon the exceptions to the same. Of course, in the present attitude of the case, this court cannot review the exceptions,

Yates vs. Shepardson. (Cross Appeals.)

they never having been considered and passed upon by the court below. We can only reverse the order of the circuit court setting aside the report, and remand the cause for the action of that court upon the report and exceptions." 27 Wis., 244.

The referee allowed the plaintiff's account against the defendant at \$4,373.47; and no exception on behalf of the latter was taken thereto. That amount, therefore, cannot be reduced, nor can the defendant now be heard to object that any item in the plaintiff's account was improperly allowed. But I think it is proved by a preponderance of the testimony that some of those items should have been allowed at larger sums, and that others, which were rejected by the referee, should have been allowed.

These will now be considered:

1. For certain professional services rendered by the plaintiff to the defendant in an action brought by the city of Milwaukee against the defendant and others, the referee allowed \$1,000. The action was on a bond in the penal sum of \$25,000, executed to the city by one Hawley as principal, and by this defendant and the other defendants in that action as sureties. The condition of the bond seems to have been broken, and the parties thereto were probably liable to the city to the full amount of the penalty. All of such parties, save the defendant *Shepardson*, seem to have been insolvent. After much effort and after devoting much time to the matter, the plaintiff succeeded in persuading the city attorney to enter a nonsuit. The cause of action is now barred by the statute of limitations. There was a question of legal ethics before the referee—the plaintiff having testified that he procured the nonsuit by *finesse*, and the question being whether he was entitled to be paid for services of that character; but the referee held that he was entitled to compensation for the services, and there is no exception which presents the question for determination here. It is a verity in the case that the plaintiff is entitled to

Yates vs. Shepardson. (Cross Appeals.)

recover for those services, and we can only determine the amount. The testimony of several distinguished members of the Milwaukee bar on the subject impels me to the conclusion that the plaintiff should have been allowed \$2,000 for his professional services in that action.

2. For services in another action, *Lain v. Shepardson*, in which the plaintiff was attorney for the defendant, the referee allowed \$1,250. It was a difficult and important case, involving property worth several thousands of dollars; it was sharply litigated through several courts, was pending several years, and involved a large amount of professional labor. It resulted favorably to *Shepardson*. I think it is proved that the plaintiff earned \$1,500 in that action.

3. The referee refused to allow a claim of the plaintiff for professional services in the case (or perhaps the two cases) of *Button v. Cross and Shepardson*. It appeared on the trial that the services were rendered by a law firm of which the plaintiff was a member. No assignment or other transfer of the claim to the plaintiff was proved. For these reasons the claim was disallowed by the referee. Considering this item alone, we have the familiar case of a nonjoinder or defect of parties plaintiff. Considering it in connection with the balance of the complaint, there may be a misjoinder of causes of action, as in *Green v. Nunnemacher*, 36 Wis., 50. In either case the objection can only be taken by demurrer or answer. R. S., ch. 125, secs. 5, 8 and 9. It was not so taken in this case, and is therefore waived. The claim was allowed by the circuit court at \$300; but the defendant's exception to the report is, that the referee failed to allow \$150 therefor. This limits the recovery, and the plaintiff can only be allowed \$150 for such services.

4. Three small items of services, amounting to seven dollars, were proved, but not allowed by the referee. Doubtless they were inadvertently overlooked.

These are the only additions to the plaintiff's account which

 Yates vs. Shepardson. (Cross Appeals.)

the evidence will warrant, although it is claimed on his behalf that others should be made. The plaintiff's account against the defendant must, therefore, be stated as follows:

Allowed by referee, - - - - -	\$4,373.47
Additional for services in <i>Milwaukee v. Hawley et al.</i> , - - -	1,000.00
Additional for services in <i>Lain v. Shepardson</i> , - - -	250.00
Services in <i>Button v. Cross and Shepardson</i> , - - -	150.00
Omitted items, - - - - -	7.00
Total of plaintiff's account, - - - - -	<u>\$5,780.47</u>

We come now to the examination of the defendant's account against the plaintiff, which was interposed as a counterclaim to the plaintiff's cause of action. The account was allowed by the referee at \$9,364.06. This amount is made up of the following allowances: 1. The principal and interest of a promissory note given by the plaintiff to the defendant for \$682.07 and twelve per cent. interest, dated June 9, 1849, and payable one day after date. 2. The sum of \$3,370 paid by the defendant for the plaintiff July 19, 1859, and interest thereon. The defendant had indorsed the note of the plaintiff for \$3,000, for the accommodation of the latter, and this payment was made on account of such indorsement; the defendant having been compelled to pay the note. When the indorsement was made, the plaintiff executed to the defendant the following instrument under seal: "Milwaukee, June 1, 1857. One year after date I promise to pay *Clark Shepardson*, or order, three thousand dollars, with interest at the rate of twelve per cent. per annum until paid." The condition of the obligation therein expressed is, that the obligor will save the defendant harmless from such indorsement. 3. The current account of the defendant against the plaintiff.

The amount allowed by the referee on the note and obligation is \$7,423.26, and on the current account \$1,940.80 — making the whole allowance \$9,364.06 as before stated. It is not denied that the amount allowed by the referee for principal and interest on account of the payment of the \$3,370, was

Yates vs. Shepardon. (Cross Appeals.)

properly allowed. But, for reasons which will now be stated, it is insisted that the note of June 9, 1849, is not a valid demand against the plaintiff.

At the time the note was given, the parties had a settlement of their accounts, and the defendant gave the plaintiff a receipt of the same date, which is as follows: "Received of *Peter Yates*, on settlement, one dollar in full of all demands, except a note of even date of six hundred eighty-two 7-100 dollars and the rat trap. C. SHEPARDSON." The "rat trap" signifies a pulley engine, invented and patented by the plaintiff, in which the defendant had an interest. The plaintiff claims, and so testified, that the note represents advances made by the defendant on account of such engine, which did not prove a success, and that it was agreed between the parties that the payment of such advances should be contingent upon the success of the invention; in other words, that payment was only to be made out of the profits thereof, and, no profits having been realized, there is no liability on the note. On the other hand, the defendant claims, and so testified, that the note was given unconditionally for the balance found due him on the settlement, and that the plaintiff is absolutely liable to him for the amount thereof.

The note contains no condition that it was only to be paid in case the engine adventure proved a success, but is, by its terms, an unconditional contract for the payment of the sum specified therein and interest. The receipt fails to show any connection between the note and such adventure. The legal effect of the receipt is the same as though it had specified that the note was given to the defendant in full of all demands against the plaintiff, and in full settlement of all their business transactions except those growing out of the engine adventure. The only oral testimony on the subject is that of the parties, and their testimony is in direct conflict. The most that can be said is, that the oral testimony is balanced. This fact, standing alone, would decide the question adversely

Yates vs. Shepardson. (Cross Appeals.)

to the plaintiff; for the *onus probandi* is with him. But it does not stand alone. The note, which, as we have said, is for the payment of money unconditionally, is evidence, and must control. It must be held, therefore, that the note expresses the contract of the parties, and the plaintiff is liable for the amount due thereon by its terms. The referee and the circuit court so held.

The circuit court modified the report of the referee by striking out items allowed the defendant in his current account, amounting to \$1,420.32. These charges were principally evidenced by checks drawn by the defendant in favor of the plaintiff for different sums which were paid to the plaintiff. The checks furnish no evidence that those sums were loans to the plaintiff. It is for the defendant to show that these checks represent loans. I think he has failed to do so, and that the charges were properly rejected by the court.

But an item of \$100 for rent of barn, allowed by the referee and rejected by the court, must be restored to the account, for the reason that no exception to its allowance was taken by the plaintiff.

The result of the foregoing views is, that the defendant's current account should be allowed at \$520.48.

This brings us to consider the correct rule of interest. Applying to this case the well settled rules of law on the subject, which are stated by the chief justice in *Marsh v. Fraser*, 37 Wis., 149, no interest can be allowed on the plaintiff's account before the action was commenced. And as that cannot be done directly, it cannot be done indirectly by making an offset, as of an earlier date, of the account against the note and obligation which draw interest. The interest on such note and obligation should, therefore, be computed in the first instance to the commencement of the action, February 22, 1868. No valid reason is perceived why the defendant was not entitled to have the interest on the money he was compelled to pay for the plaintiff computed at twelve per cent., as specified in

Yates vs. Shepardson. (Cross Appeals.)

the obligation above mentioned. But the referee computed it at seven per cent., and no exception thereto was taken on behalf of the defendant. The interest on the note at twelve per cent. from date to the commencement of the action, and on the \$3,370 from date of payment to the same time, at seven per cent., amounts to considerably more than the allowance of interest thereon by the referee for the same periods; but inasmuch as the defendant did not except to such allowance, he is bound by it.

The referee computed such interest to the date of his report (September 16, 1869), at \$3,371.19. Had he computed it on the same basis to the commencement of the action (February 22, 1868), he would have found it to be \$2,850.88. The latter sum is therefore the measure of the defendant's recovery of interest to the commencement of the action.

In accordance with the foregoing views, the defendant's side of the account, and the balance, should be stated as follows:

Current account, - - - - -	\$520 48
Note of June 9, 1849, - - - - -	682 07
Payment of July 19, 1859, - - - - -	3,370 00
Interest on note and payment to February 22, 1868, as allowed by referee, - - - - -	2,850 88
	<u>\$7,423 43</u>
Deduct plaintiff's account as above, - - - - -	5,780 47
	<u>\$1,642 96</u>
Balance due defendant February 22, 1868, - - - - -	180 50
Interest at 7 per cent. to September 16, 1869, date of report, - - - - -	<u>\$1,823 46</u>

My conclusions are, that on the appeal of the plaintiff the judgment of the circuit court should be affirmed; but that on the appeal of the defendant the judgment should be reversed, and the cause remanded with directions to that court to render judgment for the defendant for \$1,823.46, and interest

 Hammer vs. Hammer.

thereon at seven per cent. from September 16, 1869—the date of the referee's report,—to the date of such judgment.

COLE, J. I concur in the above opinion of Mr. Justice LYON.

RYAN, C. J., took no part in the decision of this cause.

By the Court.—Judgment reversed, and cause remanded with the directions stated above.

 HAMMER vs. HAMMER.

REAL ESTATE: EJECTMENT: EVIDENCE. (1) *Allotment of land under act of congress gives equitable title.* (2) *Evidence of such allotment, and of possession under it, in ejectment.*

1. An allotment of land in the Brothertown Reservation under the act of congress of March 3, 1839, vested in the allottee an equitable title, though the naked legal title probably remained in the United States.
2. In ejectment by the widow of the allottee (to whom his estate descended under the statute, upon his death without issue), it was error to reject evidence of such allotment accompanied by evidence that the allottee entered into possession under it, claiming the land as his own, and continued so to occupy it for more than twenty years; such evidence tending to show a valid title in him at his death.

APPEAL from the Circuit Court for *Calumet* County.

Ejectment, for lands in the Brothertown Reservation, the complaint alleging that the plaintiff, *Elizabeth Hammer*, had an estate in fee simple in said premises, as the widow of Ira Hammer, deceased. Answer, a general denial. The case was tried by the court without a jury. It appeared from the testimony of plaintiff's witnesses, that Ira Hammer resided on the premises in dispute at the time of his death, and had resided thereon for more than twenty years previous; that the

Hammer vs. Hammer.

plaintiff and he were married in Oneida county, New York, by a justice of the peace, in 1827, and lived together for nearly seven years, having five children, who were all dead; that they then separated, and about the year 1836, Ira Hammer came to this state, where he lived, until the date of his death, in the same house with the defendant, having a family of children by her; that plaintiff came to this state about the year 1839, and lived in the Brothertown Reservation in the same house with one Allen Murdock, by whom, however, she had no children; that defendant's name was Betsey Johnson, "or, as she called herself, Betsey Hammer," and plaintiff was sometimes called Betsey Murdock, though the people at Brothertown, to distinguish them, generally called plaintiff Betsey Al. [Allen], and the defendant Betsey Ira; and that Ira Hammer and the plaintiff were never divorced according to the laws of New York or Wisconsin. One of the witnesses testified that she was a Brothertown Indian, sixty-four years old; had known the plaintiff and Ira Hammer ever since she could remember, her first acquaintance with them being in Oneida county, N. Y. On her cross examination she testified that the plaintiff and Ira Hammer, at the time of their marriage, belonged to the Brothertown Indians; that these were not a tribe, nor was there ever such a tribe, but they were remnants of different tribes; that they adopted the laws of New York; that witness "knew of no custom among them that allowed a marriage or a separation, except a marriage by a justice of the peace or a minister, and a separation by a divorce, the same as white folks."

The plaintiff then offered certain evidence of Ira Hammer's title to the premises in dispute, the character of which is fully stated in the opinion. The evidence was rejected, and a judgment of nonsuit rendered, from which plaintiff appealed.

The cause was submitted on briefs.

A. M. Blair, for appellant:

Defendant having only denied plaintiff's title without set-

Hammer vs. Hammer.

ting up any other, the only question is, whether plaintiff proved or offered to prove enough to entitle her to recover. Under the issue joined, plaintiff need only show that she was the widow of Ira Hammer, deceased; that the latter died possessed of the premises, without issue; and that defendant was in possession at the commencement of this action. These propositions were not controverted by defendant, but she claimed that plaintiff must also prove a record title in Ira Hammer, and the court so held. Possession of land with claim of title is *prima facie* evidence of seizure in fee, and is a sufficient title to support ejectment. *Carpenter v. Weeks*, 2 Hill, 341; *Jackson v. Waltermire*, 5 Cow., 299; *Jackson v. Denn*, id., 200; *Graham v. Penfield*, 8 Car. & Payne, 536; *Jackson v. Hazen*, 2 Johns., 22; *Jackson v. Harder*, 4 id., 202. When one dies in possession of premises, that is *prima facie* evidence of title by descent in his heirs. *Smith v. Lorillard*, 10 Johns., 339. 2. The equitable title to the land in dispute became vested in Ira Hammer by the allotment of the commissioners, and the land by such allotment became liable to taxation, the legal title alone remaining in the United States. *Whitney v. Gunderson*, 31 Wis., 359; *Witherspoon v. Duncan*, 4 Wall., 210.

Coleman & Spence, for respondent:

1. Ira Hammer became a citizen of the United States by virtue of an act of congress, approved March 3, 1839, entitled "An act for the relief of the Brothertown Indians in the territory of Wisconsin." 5 U. S. Stats., ch. 83, sec. 7. If he had any title to the lands in question, it was by virtue of that act, which provides for the appointment of commissioners for the purpose of making partition and division of lands among the individuals of the tribe. The court below properly rejected the certificate of the register of deeds of Calumet county, showing the allotment of the lands to Ira Hammer, for the reason that such allotment was no evidence of title in him. Sec. 6 of the act provides that the "commissioners shall de-

Hammer vs. Hammer.

posit one copy of their report with the clerk of the county, and shall transmit another to the president of the United States," etc. The certificate of the register of deeds is not evidence of the allotment, first, because there was no law authorizing it to be filed there; and second, because the section expressly declares that the members of the tribe are authorized to hold the lands allotted to them by the patents issued. It provides, that "the president shall thereupon cause patents to be issued to the several individuals named in said report, for the lands so apportioned to them respectively, *by which* the said persons shall be authorized to hold the said lands in fee simple to themselves and their heirs and assigns." Plaintiff's claim as the heir of Hammer, under grant from the United States, was therefore not sustained by any competent proof. Nothing but the patent could show such title. 2. Plaintiff's offer to show possession in Ira Hammer at the time of his death, etc., was properly rejected. (1) The plaintiff and Hammer were not citizens of the United States at the time of the alleged marriage, and did not become so until the passage of the act of congress above mentioned. They were Indians, and subject to our laws only so far as the public safety required. By custom among tribes of Indians, either party may dissolve the marriage contract at pleasure; and the fact that the marriage is solemnized by the laws of the United States, does not make it more binding upon the parties. The fact that they separated, and lived apart for forty years, each taking another partner, shows that they considered the marriage contract between them dissolved; and if so, plaintiff has no right to the property owned by Hammer at his death. Tyler on Inf. & Cov., 826; *Johnson v. Johnson*, 30 Mo., 72; *Goodell v. Jackson*, 20 Johns., 710. (2) Plaintiff, having lived in the vicinity of defendant and her children over twenty years, making no claim to this property, and no claim to be Hammer's wife, but living with another man, is *estopped*, on grounds not only of public policy but of good

Hammer vs. Hammer.

faith towards defendant and her children, from repudiating her representations. 1 Greenl. Ev., § 207; 2 Parsons on Con. (4th ed.), 340, note 2.

COLE, J. The ground of the decision granting the nonsuit is not stated, and, as the bill of exceptions does not purport to contain all the evidence given on the trial, we are unable to determine what it was. .

The plaintiff seems to have shown, *prima facie* at least, that she was married to Ira Hammer in September, 1827, in Oneida county, New York, by a justice of the peace, and that she was never divorced from him. It also appeared that Hammer died in 1873, leaving no issue by the plaintiff. Under the statute his estate descended to his widow.

As a part of her case, the plaintiff offered in evidence a certificate of the register of deeds of Calumet county, in which the register certified that he had carefully examined the records in his office, and found that the lot in question in the Brothertown Reservation was allotted to Ira Hammer pursuant to the act of congress of March 3, 1839, as appeared by a map or plat of the Brothertown Reservation certified to by the commissioner of the general land office at Washington and filed in the register's office. The attorneys of the parties had stipulated that this certificate of the register as to the filing and contents of the allotment of lands of the Brothertown Indians in the Brothertown Reservation should be admitted in evidence on the trial the same as if the original allotment were offered in evidence. The admission of the certificate was objected to, and it was ruled out as not being evidence of title in Ira Hammer. In connection with this proof the plaintiff offered to show that Hammer took immediate possession of the premises allotted to him in 1839, claiming them as his own, and occupied them until his death. But this evidence was excluded on the objection of the defendant. It seems to us the evidence offered, if not conclusive upon the question of

Hammer vs. Hammer.

ownership, tended to prove title in Ira Hammer, and should have been admitted. According to the stipulation, the certificate of the register, as to the filing and contents of the report of the commissioners, was to have the same effect in evidence as the original report. There can be no doubt that the allotment under the act of congress vested in the allottee an equitable title, if it did not give him the fee, as it probably did not (see ch. 83, 5 U. S. Stats. at Large, p. 349, sec. 6). But though the naked legal title remained in the United States, all the beneficial interest passed to the allottee, who became the real owner of the property. His rights were the same in respect to the land apportioned to him, as those of an ordinary purchaser who receives the usual certificate at a cash entry. *Witherspoon v. Duncan*, 4 Wall., 210; *Whitney v. Gunderson*, 31 Wis., 359. Now it was proposed to show that Hammer entered into possession under the allotment, claiming the land as his own, and continued in the occupation of it for more than twenty years. And the question is, Did not the original allotment, and this proof of possession under it until the bar of the statute had run (ch. 138, sec. 6), tend to show a valid title in Ira Hammer at the time of his death? It seems to us that the question must receive an affirmative answer. It will be borne in mind, that under our statute a receiver's receipt, or the certificate of the entry or location of lands made by a receiver or register, is made *prima facie* evidence of title. Sec. 130, ch. 137, R. S. Doubtless, Hammer in his lifetime could have maintained an action of trespass or ejectment against any disseizor or trespasser. No court, upon the facts proposed to be proved, could deny his right to maintain either action under our statutes. In *Bates v. Campbell*, 25 Wis., 613, it was held that bare possession constitutes an interest in land, sufficient to sustain ejectment against a wrongdoer who has intruded on such possession. And in *Carpenter v. Weeks*, 2 Hill, 341, which was an action of ejectment for dower set off to the plaintiff, Mr.

 Wiesner vs. Zaun.

Justice COWEN says: "Possession of land with claim of title is *prima facie* sufficient evidence of seizin in fee, even to sustain the demandant's claim in a writ of right. (*Doe ex dem. Graham v. Penfold*, 8 Carr. & Payne, 536, with the cases cited in Cowen & Hill's Notes to 1 Phil. Ev., 354.) Some cases do not even require a claim, but hold a naked unexplained possession to be *prima facie* sufficient. In *Jackson v. Waltermire* (5 Cow., 301), which was dower *unde nihil habet*, SAVAGE, C. J., said he thought the same evidence of seizin should entitle the widow to recover her dower, as would be sufficient to authorize a recovery by the heir. In such case the seizin of the deceased is proved by showing his actual possession of the premises."

There can be no doubt that the evidence offered by the plaintiff should have been admitted as tending to establish her right to recover. Other questions are discussed in the briefs of counsel; but as the bill of exceptions does not purport to contain all the evidence given on the trial, we are in the dark as to what the facts were, bearing upon those questions. Of course we express no opinion upon them.

By the Court.—The judgment of the circuit court is reversed, and a new trial ordered.

 WIESNER VS. ZAUN.

DEED: ESTOPPEL. (1) Deed construed as purporting to convey the whole land, and giving color of title thereto. (2) Grantor's subsequent title enures to grantee by estoppel.

STATUTE OF DESCENTS. (3, 4) On death of minor child, surviving brothers and sisters take his share of his deceased parent's estate as heirs of the parent. (5, 6) Rule explained and limited.

STATUTE OF LIMITATIONS. (7, 8) Disability of coverture suspended the running of the statute before the act of 1872.

1. J. G. A., after the death of his wife, Rosina A., being in possession of land.

Wiesner vs. Zeun.

which had belonged to her, and entitled to the possession as tenant by the curtesy and as owner in fee of an undivided one-sixth thereof as heir-at-law of a deceased son, Henry A., conveyed the land by warranty deed to Z.; in the premises of which deed the grantor is described as "father of Henry A., deceased, and husband of Rosina A., deceased, and only heir-at-law of both." Then follow apt words to convey the whole land. *Held*, that the deed purports to convey the whole land, and not merely the interest which the grantor really had therein; and possession of the land under such deed by the grantee and those claiming under him was a possession under color of title adverse to the surviving children and heirs of Rosina A., and would ripen into a perfect title in ten years, under the statute of limitations. R. S., ch. 133, secs. 6, 7, 10.

2. The grantor in such deed having subsequently become entitled to another undivided sixth part of said land as heir-at-law to another child, deceased, said title, by virtue of the covenants in the deed, enured to the benefit of the grantee therein named, by way of estoppel.
3. After the death of said grantor, a third child of him and the said Rosina A. died, a minor and unmarried. *Held*, that the undivided one-sixth interest in the land, which said child inherited from the mother, descended to the three surviving children in equal shares (R. S., ch. 92, sec. 7; Tay. Stats., 1170, § 1, subd. 6); and said surviving children took as heirs of the mother, and not as heirs of the deceased child. *Perkins v. Simonds*, 28 Wis., 90, as to this point, reaffirmed and held applicable to the revision of 1858.
4. The undivided one-eighteenth which thus descended to plaintiff as one of the three surviving heirs of Rosina A., is held by plaintiff in the same manner, and subject to the same rules of law, as the one-sixth interest which accrued to her immediately upon the mother's death; and it may be recovered in this action if said one-sixth may be thus recovered, and not otherwise.
5. The rule that, upon the death of a minor child, the interest in land which he inherited from his mother descends to the surviving children, as heirs of the mother, and not as heirs of such deceased minor, is not intended to affirm that such surviving children will take the title unaffected by any conditions, as though such minor had never existed.
6. If the estate of such deceased minor had been sold under the statute for his maintenance or education, the purchaser might have acquired a perfect title, which would not be divested on the minor's death.
7. The "disability" which prevented the statute of limitations upon actions for the recovery of real property from running in cases of infancy, insanity, imprisonment and coverture, by the law of this state found as sec. 13, ch. 133, R. S. (but now repealed by ch. 44, Laws of 1872), did not necessarily mean an "incapacity to do a legal act," but related also to

Wiesner vs. Zaun.

the condition of a party subject to legal "duress," or to the control and protection of other persons; and such disability still existed in the case of a married woman (before the act of 1872), notwithstanding the statute concerning the "rights of married women" (Laws of 1850, ch. 44; Tay. Stats., 1195), which gave to a wife the absolute control of her separate estate the same as though she were unmarried, and notwithstanding sec. 15, ch. 122, R. S., which permitted her to sue alone in respect to such estate.

8. If plaintiff had been an unmarried woman at the time of the death of tenant by the curtesy, in 1857, she being then of age, and the defendant or his grantor being in actual adverse possession of the whole land under the deed above described, her rights would have been barred by the statute in 1867. But she being then and ever since a married woman, the statute did not commence to run against her until ch. 44, Laws of 1872, took effect.

APPEAL from the Circuit Court for *Washington* County.

The action was brought to recover an undivided interest in certain lands situated in *Washington* county, and was tried by the court without a jury. The case, as it appears from the pleadings, evidence and findings of fact by the court, is as follows:

The land in which the plaintiff claims such interest was purchased from the United States by one Ebenezer Jones, and, in the year 1846 was conveyed to Rosina Ahnert, the wife of Johann Gottlieb Ahnert. This conveyance names "Ebenezer Jones and Abigail Jones, his wife," as the grantors, but was not executed by the wife.

In 1847, Rosina Ahnert died intestate seized of such land, leaving surviving her said Johann Gottlieb, her husband, and six infant children of their marriage, to-wit: Henry, aged nineteen; August, aged seventeen; *Karolina* (the plaintiff), aged fifteen; Karl, aged thirteen; Ernst, aged eleven; and Franz, aged eight years.

In 1849, Henry, the eldest son, died without issue, unmarried and intestate. At the time of his death he was the owner of an undivided one-sixth of said land, which he

Wiesner vs. Zaun.

inherited from his mother ; and, it is assumed, he was then over twenty-one years of age.

In 1851, Johann Gottlieb Ahnert, being in possession of the land, and entitled to such possession as tenant by the curtesy, and as the owner in fee of an undivided one-sixth part thereof as heir-at-law of his son Henry, conveyed the same to Philip Andreas Zaun, the grantor of the defendant. Such conveyance commences as follows: "This indenture, made this seventh day of June, 1851, between Johann Gottlieb Ahnert, father of Henry Ahnert, deceased, and husband of Rosina Ahnert, deceased, and only heir-at-law of both, party of the first part, and Philip Andreas Zaun, party of the second part, Witnesseth:" Then follow apt and proper words to convey the whole tract of land of which the plaintiff claims an undivided part, with the usual covenants of seisin, against incumbrances, for quiet enjoyment, and of warranty. Afterwards, and during the same year, Abigail Jones, the wife of the former owner of the land, executed to Philip Andreas Zaun a quitclaim deed thereof, which was doubtless intended as a release of her inchoate right of dower in the land. Zaun forthwith entered into possession of the land, upon the execution of the conveyance thereof to him by Ahnert, and resided thereon with the defendant (his son) from that time until he conveyed the same land to the defendant as herein-after mentioned.

In 1855, August Ahnert, then being of full age and the owner of an undivided one-sixth of said land as heir-at-law of his mother, died intestate, without issue, and unmarried.

In 1857, Johann Gottlieb Ahnert also died intestate.

In 1860, Franz Ahnert died, being then under the age of twenty-one years, unmarried, and without issue.

In 1861, Philip Andreas Zaun, by deed containing full covenants of warranty, conveyed to the defendant the whole of the land described in Ahnert's deed to him, and immediately

Wiesner vs. Zaun.

removed therefrom, leaving the defendant in full possession thereof. The defendant has been in the actual possession and occupancy of said land ever since the execution of such conveyance. During the whole time of his occupancy, Philip Andreas Zaun claimed title to the whole of the land described in Ahnert's conveyance to him, exclusive of any other right, founding his claim on such conveyance; and the defendant, in like manner, claimed title thereto, founding his claim on the same conveyance and on the deed thereof from Philip Andreas to himself.

In August, 1873, Ernst Ahnert also died intestate, without issue, and unmarried. He was then about thirty-seven years of age.

In 1851, the plaintiff intermarried with one Frederick Wiesner, who is still living, and she is still his wife. Karl Ahnert is also living.

This action was commenced in November, 1873.

The conclusions of law filed by the circuit judge are as follows:

"1. That the said children of said Rosina Ahnert, on their mother's death, were each vested with an undivided one-sixth of the land by inheritance so as aforesaid owned by her at her decease, subject to the tenancy by the curtesy of said Johann Gottlieb Ahnert.

"2. That on the death of Henry Ahnert, his interest or share descended to his father, Johann Gottlieb Ahnert.

"3. That on the decease of August Ahnert, in 1855, his share of the lands described in said deed of 1851, by virtue of the covenants of warranty therein and the estoppel resulting therefrom, descended to and became the property of Philip Andreas Zaun, the grantee of his father, Johann Gottlieb Ahnert.

"4. On the death of Franz Ahnert, in 1860, his share in said lands last described, descended to his surviving brothers and sister.

Wiener vs. Zaun.

"5. At the death of Ernst, in 1873, his interest or share in said land had become cut off by operation of the statute of limitations, which had run against him and in favor of the defendant herein, who had been in possession under said deed of 1861, in good faith, as hereinbefore found, and for more than ten years after said Ernst had become twenty-one years of age.

"6. That said plaintiff is under the disability of coverture, and not as yet affected by the operation of said statute of limitations in favor of said defendant.

"7. That said plaintiff is entitled to recover possession from the defendant of her share aforesaid, to wit, four-eighteenths of [said land], which is unlawfully withheld by said defendant, together with six cents damages.

"8. That the plaintiff is entitled to recover no greater or other interest in said land than as last above specified.

"9. That judgment be entered that the plaintiff do recover possession of said defendant of her four-eighteenths of said land as aforesaid, with said damages and costs."

Judgment was entered accordingly; from which the defendant appealed.*

*The territorial statutes of Wisconsin, as revised in 1839, contained the following provisions (p. 269) as part of "An act concerning the time of commencing actions:" § 13. "If any person entitled to commence any action in this act specified, or to make any entry, avowry or cognizance, be at the time such title shall first descend or accrue, either (1) Within the age of twenty-one years; or, (2) Insane; or, (3) Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offense for any term less than for life; or (4) A married woman, the time during which such disability shall continue, shall not be deemed any portion of the time in this act limited for the commencement of such suit, or the making such entry, avowry or cognizance. But such person may bring such action or make such entry, avowry or cognizance after the said time so limited, and within ten years after such disability is removed, but not after that period." § 14. "If the person entitled to commence such action, or to make such entry, avowry or cognizance, shall die during the continuance of any disability specified in the preceding section, and no de-

Wiesner vs. Zaun.

The cause was first argued at the June term, 1874.

Butler & Winkler, for the appellant:

1. The defendant and his grantor held adverse possession under color of title, from 1851 to the commencement of the action. *Sydnor v. Palmer*, 29 Wis., 250; *Stevens v. Brooks*, 24 id., 326; *Edgerton v. Bird*, 6 id., 527. 2. The statute of limitations began to run against the heirs of Rosina Ahnert upon the death of her husband, who was tenant by the curtesy. *Doe v. Gregory*, 2 Ad. & El., 14; *Jackson v. Harsen*, 7 Cow., 323; *Jackson v. Schoonmaker*, 4 Johns., 390; *Miller v. Ewing*, 6 Cush., 34; *Gernet v. Lynn*, 31 Pa. St., 94; 3 Wash. R. P., 132, § 30; Tyler on Eject., 117, 118. 3. Assuming the plaintiff to have been under constant disability, can she recover the one-eighteenth to which she became entitled on the death of her brother Franz? It is claimed for the plaintiff, that as she was under disability

termination or judgment be had of the title, right or action to him accrued, his heirs may commence such action, or make such entry, avowry or cognizance, after the time in this act limited for that purpose, and within ten years after his death, but not after that period." §§ 12 and 13, ch. 127, R. S. 1849 ("Of the limitation of actions"), are in the same language as those above quoted, substituting "chapter" for "act." The corresponding provisions in the R. S. of 1858 are found in sec. 13, ch. 138, which is as follows: "If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, either (1) Within the age of twenty-one years; or, (2) Insane; or, (3) Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life; or, (4) A married woman, the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced or entry or defense made, after the time limited, and within five years after the disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period."

The revision of 1839 (pp. 184, 185) contained the following provision: § 38. "When any person shall die seized of lands, tenements or hereditaments not

Wiesner vs. Zaun.

when this interest accrued, the time of such disability is excluded, without regard to the adverse possession before the title came to her, it not being then barred. Such a doctrine might suspend the operation of the statute through generations, if not forever; since a title may be continually held by parties under disability. We have always supposed the law to be, that cumulative disabilities are of no avail, and that the disability of the party to whom an estate or title adversely possessed *first* descends, is the only one for which an allowance is made, whether the action be brought by that party himself or by his heirs. The principle of the statute of limitations is, that the action must be brought within the time limited from the time *when the right of action accrued*; and it is extended only by a disability which then intervenes. *Henry v. Carson*, 59 Pa. St., 296; Angell on Lim. (5th ed.),

by him devised, the same shall descend in equal shares to and among his children and such as legally represent them (if any of them be dead), and in every case where children shall inherit by representation, it shall be in equal shares; and where there are no children of the intestate, the inheritance shall descend equally to the next of kin in equal degree, and those who represent them, computing by the rules of the civil law." * * § 39. "When any of the children of the intestate dies before his arrival at the age of twenty-one years, and unmarried, such deceased child's share shall descend equally among the surviving brothers and sisters, and such as legally represent them; but if such deceased child die after having arrived at the age of twenty-one years, unmarried and intestate, in the lifetime of the mother, every brother and sister shall inherit equally with the mother." Sec. 1, ch. 63, R. S. 1849 ("Of title to real property by descent"), contained the following provisions in subds. 5 and 6: "5. If the intestate shall leave no issue, nor widow, and no father, mother, brother or sister, his estate shall descend to his next of kin in equal degree [with an exception not important here]: *Provided*, however, 6. If any person shall die leaving several children, or leaving one child and issue of one or more other children, and any such surviving child shall die under age and not having been married, all the estate that came to the deceased child by inheritance from such deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of any such other children who shall have died, by right of representation."

Subds. 6 and 7 of sec. 1, ch. 92, R. S. 1858, are in the same terms.

ch. 36, §§ 477 and notes, 479, 480, and cases there cited. The case falls within the direct terms of our statute. Franz Ahnert died in 1860, under age. He was "*the person entitled dying under disability.*" The extension of the ordinary period of limitation by this disability clause must, in this case, fall within five years after his death. Angell on Lim., § 480. 4. When plaintiff's title to *one-sixth* of the land accrued, upon the death of her father in 1857, she was a married woman; but her marriage was not a disability which gave her immunity from the statute of limitations. Sec. 12, ch. 127, R. S. of 1849, did not attempt to create disabilities, but enumerates certain classes of persons then under actual, well known legal restrictions and incapacities, and suspends the statute of limitations in their behalf. Among these are mentioned married women, because they were then under an actual disability. At the common law the wife "was not only incapable of conveying her real estate by deed, but could not, as a general rule, make a valid contract of any description in relation either to real or personal property." "Her acts were not, like those of infants and some other *disabled persons*, voidable only, but, in general, absolutely void." She could not employ an attorney; she could not sue. Tyler on Inf. & Cov., 311-320; 1 Parsons on Con., 339. But shortly after the R. S. of 1849 took effect, the disability, the legal incapacity, of the married woman, as it then existed, was absolutely swept away, so far as her separate estate was concerned, by ch. 44, Laws of 1850. This statute gave her the right to sue alone. *Norval v. Rice*, 2 Wis., 30; *Botkin v. Earl*, 6 id., 393; *Conway v. Smith*, 13 id., 125-136. "With respect to her separate property, the statute has placed her upon the same footing as to all the world, her husband included, as if she were, in the words of the statute, 'a single female.'" 29 Wis., 140. When, therefore, the plaintiff's title to the one-sixth now in question accrued, she could assert and exercise her rights of ownership to the same extent as any of her

Wiesner vs. Zaun.

adult brothers. It seems to us clear, as an original proposition, that the act of 1850 terminated the disability referred to in the statute of limitations, so far as the recovery of her separate estate is concerned. Counsel cited in support of this view, *Slater v. Cave*, 3 Ohio St., 80; *Brown v. Cousens*, 51 Me., 301; *Ball v. Bullard*, 52 Barb., 141; *Thompson v. Cragg*, 24 Tex., 583; *Ong v. Sumner*, 1 Cinc. Sup. Ct. R., 424; and criticised *Bauman v. Grubbs*, 26 Ind., 419; and *Burke v. Beveridge*, 15 Minn., 205. They further contended that, as plaintiff's title accrued in 1857, the question of disability in this case is not embarrassed by the reenactment of the married woman's act and the old disability clause, at the same time, in the R. S. of 1858. If the plaintiff was under no disability when her right accrued, then no disability created by the statutes of 1858 can avail her. Sec. 34, ch. 134, R. S. 1858. The terms of sec. 13 of the latter act are also in the future tense. Counsel further contended that the disability clause in the statute of limitations, as found in the revision of 1858, should be construed as referring solely to causes of action in favor of married women as to which their disabilities were not removed by the act of 1850; as for a personal injury suffered through the negligence of another, or for property received from the husband. *Pike v. Miles*, 23 Wis., 164.

5. Zaun's purchase and occupancy under claim of title can not be impugned for bad faith upon any facts appearing in this case. *Rawson v. Fox*, 6 Ch. Leg. News, 278. In determining the question of good faith in such cases, the maxim that all persons are presumed to know the law, has no application. Otherwise the multitude of cases (such as *Edgerton v. Bird*, 6 Wis., 527) where deeds void on their face have been held to confer color of title, have been wrongly decided. *Livingston v. Peru Iron Co.*, 9 Wend., 511, arose under the champerty act, and presented a case of actual fraud. Yet it is held that the doctrine of that case, even, is not applicable to adverse possession under the statute of limitations. *Humbert*

Wiesner vs. Zaun.

v. Trinity Church, 24 Wend., 587, 610, 632, 634; *Crary v. Goodman*, 22 N. Y., 170, 177; Tyler on Eject., 863-5.

Mariner, Smith & Ordway and *Frisby & Weil*, for the respondent:

1. Coverture furnished in this state a perfect answer to the statute of limitations (Terr. Stat. of 1839, p. 260; R. S. 1849, ch. 127, sec. 12; and R. S. 1858, ch. 138, sec. 13), until the elimination of the coverture clause by ch. 29, Laws of 1872. The Married Woman's Act of 1850 did not repeal this clause by implication. Such repeals are not favored in the law, and are recognized only in cases of necessity. *Potter's Dwaris*, 113, note 9, and 154; *White v. Johnson*, 23 Miss., 68; *McCool v. Smith*, 1 Black, 459; *Wood v. U. S.*, 16 Pet., 342; *Brown v. Comm'rs*, 21 Pa. St., 37; *Bowen v. Lease*, 5 Hill, 221; *Williams v. Potter*, 2 Barb., 316; *Att'y Gen. v. Brown*, 1 Wis., 513; *Goodrich v. Milwaukee*, 24 id., 422. The disability referred to by the statute is not merely an inability to sue; for an infant also may sue by next friend or guardian. *Bingham on Inf.*, 117, 118, and note; *Angell on Lim.*, § 195. The disabilities of infants result from the precautions of the law to guard them against their own inexperience. As to coverture, the sole authority is in the husband, and the wife must obey, and all her disabilities remain except so far as necessary to carry out the statute as to the care and use of her separate property. *Peck v. Ward*, 18 Pa. St., 506; *Mahon v. Gormley*, 24 id., 80; *Wooster v. Northrup*, 5 Wis., 245; *Cord's Married Women*, §§ 974 et seq. The statute in each case is to run until the disability is removed; and this must mean *all* the disabilities of the state of marriage, infancy, etc. *Burke v. Beveridge*, 15 Minn., 205; *Bauman v. Grubbs*, 26 Ind., 419; *Dunham v. Sage*, 52 N. Y., 229. The doctrine contended for by the defendant would bar the special right of redemption vested in a married woman in the case of tax sales, a right which this court has repeatedly recognized. *Wright v. Wing*, 18 Wis., 50, 51; *Woodbury v. Shackelford*,

Wiesner vs. Zaun.

19 id., 60, 61; *Deery v. McClintock*, 31 id., 204. (Counsel also criticised and distinguished the cases of *Ong v. Sumner*, 1 Cin. Sup. Ct. R., 424; *Brown v. Cousens*, 51 Me., 301; and *Slater v. Cave*, 3 Ohio St., 80.) A statute ought to be so construed that, if possible, no clause, sentence or word shall be superfluous, void or insignificant (*Harrington v. Smith*, 28 Wis., 43); and statutes of limitation are to be strictly construed. Angell on Lim., §§ 485-6; *Demarest v. Wynkoop*, 3 Johns. Ch., 146. Where there is no ambiguity in the language of the statute, courts cannot correct supposed defects. *Benton v. Wickwyre*, 9 Alb. L. J., 309; Dwaris, 721; *Buffham v. Racine*, 26 Wis., 449, and cases there cited. In construing positive statutory enactments, the maxim, "the reason of the law ceasing, the law itself ceases," is inapplicable. *Ellis v. Griffith*, 16 M. & W., 109. The language of the disability clause, including the case of a married woman, is perfectly plain; and if its enforcement would work injustice, which we deny, the cure must be with the legislature. *Rosenplanter v. Rørsle*, 54 N. Y., 262. 2. Plaintiff had no right of entry until the death of the tenant by the curtesy; and until that time the possession of defendant's grantor was not adverse (Angell on Lim., §§ 369, 371-2 and p. 422; 2 Washb. R. P., 2nd ed., 475, 505; *Sands v. Hughes*, 53 N. Y., 294); and no act or declaration of his could make the possession adverse so as to set the statute running. *Stræbe v. Fehl*, 22 Wis., 343; *Jones v. Billstein*, 28 id., 221, 225-6; *Merriman v. Caldwell*, 8 B. Mon., 33; *Salmon's Adm'rs v. Davis*, 29 Mo., 176; *Melvin v. Proprietors, etc.*, 16 Pick., 137; *S. C.*, 17 id., 255; *Raymond v. Holden*, 2 Cush., 269; *Gernet v. Lyon*, 31 Pa. St., 94; *Jackson v. Schoonmaker*, 4 Johns., 402. 3. The ten-year limitation (R. S., ch. 138, secs. 6, 10) did not begin to run on the death of the tenant by the curtesy, in 1857. (1) No entry was then made under the deed of 1851. Such entry had already been made in 1851; and there could be but one entry under that deed, and

Wiesner vs. Zaun.

one possession. (2) The entry made by defendant's father in 1851 cannot be treated as made "under claim of title, *exclusive of any other right.*" The deed to him on its face conveyed only the grantor's interest as heir of his son Henry and as tenant by the curtesy. The covenants of warranty are no part of the conveyance. They only refer to the estate conveyed; and, the deed not professing to pass any greater estate than that above described, they cannot operate as color of title to any greater estate. *McRae v. Williams*, 7 Jones' Law (N. C.), 430; *Crary v. Goodman*, 22 N. Y., 170; *McEvoy v. Loyd*, 31 Wis., 146. The recitals of the deed fix the intention of the parties. 3 Washb. R. P., 368. The description of the grantor as heir of Rosina Ahnert, deceased, is indeed unusual as applied to a tenant by the curtesy; but it might well be embraced in the general definition of the word "heir," as the person who takes an estate in lands or tenements by descent from another, as distinguished from an alienee or a devisee. 2 Burr. Law Dic., 565. It certainly carries the information that the grantor acquired his estate without deed or will; and the interest so derived from his wife could only be that of a tenant by the curtesy. These recitals operated as notice to the grantee of the character of his grantor's title. *Parker v. Kane*, 4 Wis., 1; *Lamont v. Stimson*, 5 id., 443; *Fallass v. Pierce*, 30 id., 468-9; *Quinlan v. Pierce*, 34 id., 304; *Goodenough v. Spencer*, 46 How., 353; *Williamson v. Brown*, 15 N. Y., 358-362; *Baker v. Bliss*, 39 id., 70; *Read v. Gannon*, 50 id., 345-350; *Reeder v. Barr*, 4 Ohio, 459; 2 Washb. R. P. (2nd ed.), 685. The deed conveying on its face only the one-sixth interest of the grantor as heir of Henry and his life estate as tenant by the curtesy, there could be under it no *bona fide* claim of a greater estate. Angell on Lim., § 401, note 6, and § 408; *McEvoy v. Loyd*, *supra*; *Thompson v. Cragg*, 24 Tex., 582; *Doe v. Roe*, 25 Ga., 178. (Counsel further argued from the answer and the evidence that defendant's grantor took his deed with notice of the

Wiesner vs. Zaun.

nature of his grantor's title.) The claim of title in such cases must be made in good faith. *Whitney v. Powell*, 1 Chand., 52; *Woodward v. McReynolds*, id., 250; *Edgerton v. Bird*, 6 Wis., 536; *Livingston v. Iron Co.*, 9 Wend., 513, 517-18; *La Frombois v. Jackson*, 8 Cow., 595, 602; *Clapp v. Bromagham*, 9 id., 531, 557; 15 Barb., 490-91; 19 Vt., 164; *Watson v. Gregg*, 10 Watts, 296; *Bradstreet v. Huntington*, 5 Pet., 409; 25 Ga., 178; Angell on Lim., §§ 37, 404-5; Tyler on Eject., 871. 4. The deed of the tenant by the curtesy, whatever its form, conveyed in fact only an estate for his life. R. S., ch. 83, § 32, and ch. 86, § 4. On his death the estate ended absolutely, and there could be no holding over or tenancy by sufferance; and the act of his grantee in retaining possession was that of a stranger intruding. Angell on Lim., §§ 331, 444; *Doe v. Prosser*, 1 Cowp., 217; *Jackson v. Harsen*, 7 Cow., 327; *Clapp v. Bromagham*, 9 id., 554; *Constantine v. Van Winkle*, 6 Hill, 194, and note; *Sands v. Hughes*, 53 N. Y., 294; *Miller v. Shackelford*, 3 Dana, 289. Philip Zaun's possession and cultivation of the land, from that time, to the exclusion of the plaintiff and other heirs, and his claim to own the whole, was a disseisin of the true owners, and adverse to the whole world. *Jones v. Reeves*, 6 Rich. Law, 132; *Brown v. Spand*, 2 Mill (S. C.), 11; *Livingston v. Peru Iron Co.*, 9 Wend., 517; 9 Cow., 554. The answer also admits that such holding by Philip Zaun was adverse. The twenty-year limitation, therefore, began in 1857 to run in favor of Philip Zaun and any person claiming under him. 5. There was no change of the possession by virtue of the deed from Philip Zaun to the defendant in 1861, such as would set the ten-year limitation running in defendant's favor from that time. (1) There was in fact *no change* of place or position on defendant's part. He had resided with his father since 1851, doing most of the work on the same land. He resided there after his marriage, and his father did not remove from the land until *after* the deed to defendant. The latter was performing the same acts

Wiesner vs. Zaun.

of ownership before as after the date of his deed. (2) He who takes by grant from one already in possession (especially if sharing that possession with him), will be regarded as continuing under the same title. *Finlay v. Cook*, 54 Barb., 9; *Angell on Lim.*, § 442. There can be but one adverse possession, and that must be continuous, no matter how often it may be assigned or transferred from one person to another. *Merriam v. Caldwell*, 8 B. Mon., 33. If defendant's grantor had held adversely for nineteen years before conveying the land, defendant, continuing in possession one year thereafter, could have claimed the benefit of the twenty years of adverse possession. *Chadbourn v. Swan*, 40 Me., 260. He made no entry, took no new possession, under his deed, and has no greater right than his grantor would have acquired under the adverse possession commenced in 1857, if the grantor had continued in possession until the commencement of this action. 6. Were it true that Philip Zaun could hold over, as by sufferance, still, on his severing the relation by deed to another person also in possession, the reversioner might treat his grantee as a disseizor holding *mala fide*, and sue in ejectment. *Angell*, § 443. (Counsel also contended, upon the evidence, that the defendant was not a purchaser in good faith without knowledge of Rosina Ahnert's heirs, and for that reason could not claim the benefit of the ten-year limitation, citing *Park v. Kane*, *supra*; *Sterry v. Arden*, 1 Johns. Ch., 261, 9 Cow., 554; *Saxton v. Hunt*, 1 Spencer (N. J.), 487; *Fallass v. Pierce*, *supra*; *Phelan v. Boylan*, 25 Wis., 683). 7. If correct in the foregoing positions, we are entitled to recover an undivided one-half of all except the one-sixth inherited by John Gottlieb Ahnert from his son Henry prior to the deed of 1851. (1) The one-sixth inherited from his son August, in 1855, went, on Gottlieb's death, to his heirs; and the covenant of warranty in the deed of 1851, does not estop them from claiming the title; because, as we have already shown, that deed does not *undertake to convey* anything more than the

one-sixth inherited from Henry, and the grantor's life estate in the other five-sixths. 2 Washb. R. P., 480-81; *Mickles v. Townsend*, 18 N. Y., 577, and cases there cited; *Allen v. Holton*, 20 Pick., 458. (2) At the death of Franz, in 1860, he was under the disability of infancy, and would have had five (if not ten) years after his majority to bring this action. His interest descended to his surviving brothers and sisters; and plaintiff, being a married woman when that interest so descended, was entitled to the protection of the state. (3) On the death of Ernst, in 1873 (about thirty-seven years old), his title descended to his surviving brother and sister, the latter (the plaintiff herein) being still under the disability of coverture. If defendant could acquire a prescriptive right only by an adverse possession of twenty years, plaintiff is clearly entitled to all the interest she seeks to recover.

LROX, J. I. It seems to be conceded (and the fact doubtless is), that, from the death of Johann Gottlieb Ahnert, in 1857, the possession by the defendant and his grantor of the land in controversy has been adverse to the claim of the plaintiff. The question discussed by the learned counsel is, whether the same was a possession under color of title, in favor of which the statute of limitations might run in ten years, or whether it comes under the limitation of twenty years applicable to cases in which the claim of title is not founded upon a written instrument purporting to be a conveyance of the land thus possessed. R. S., ch. 138, secs. 6-10 (Tay. Stats., 1622-3).

It was strongly argued on behalf of the plaintiff, that the deed from the elder Ahnert to the grantor of the defendant does not purport to convey the whole of the tract of land, an undivided share of which is claimed by the plaintiff, but only the interest therein which the former took as tenant by the curtesy and as heir of his deceased son Henry. If this be a correct position, it necessarily follows therefrom that the de-

Wiesner vs. Zaun.

fendant cannot successfully assert an adverse possession of the land by color of title, a continuance of which for ten years may operate to bar the plaintiff's claim.

The deed under consideration is, in form, a conveyance of the whole tract therein described. It may well be doubted whether the words relating to the grantor, to wit: "Father of Henry Ahnert, deceased, and husband of Rosina Ahnert, deceased, and sole heir of both," are anything more than a mere *descriptio personæ*. If they amount to more than that, when the grantor described himself as *sole* heir of his wife, who died seized of the land, he thereby indicated an intention to convey the whole interest in such land, and, as we have seen, he used apt words to carry out his intention. We conclude that the deed of 1851 purports, on its face, to convey the whole tract.

From the foregoing views, two results follow. These are, 1. The possession of the defendant and his grantor was under color of title, and adverse to the plaintiff; and 2. By virtue of the covenants in the deed from the elder Ahnert, the interest in the land which he inherited as heir of his son August (who died in 1855), enured to the benefit of the defendant's grantor, by way of estoppel.

II. Ernst Ahnert was of full age when the adverse possession of the elder Zaun commenced in 1857, and his right of action to recover his portion of the land became barred by the statute of limitations in 1867. Hence, when he died in 1873, no such right of action descended to his heirs.

III. Franz Ahnert dying in 1860 under the age of twenty-one years, and never having been married, the undivided one-sixth of the whole tract, which he inherited from his mother, descended to his surviving brothers and sisters (Karl, Ernst and the plaintiff), in equal shares. R. S., ch. 92, sec. 1, subd. 7 (Tay. Stats., 1170, § 1, subd. 6).

In *Perkins v. Simonds*, 28 Wis., 90, we held, after much investigation, that in such a case the surviving brothers and

sisters inherit from the ancestor and not from the deceased child. As applied to the present case, the rule there settled is, that the plaintiff took one-third of the share of Franz in his mother's estate, in the same manner in which she would have taken it had Franz died before his mother. The amount of the interest which she so took is of course increased by the death of Henry and of August, after the death of their mother.

Perkins v. Simonds was ruled by the revised statutes of 1839, p. 185, § 39, which is substantially the same as the corresponding provision in the revision of 1858 last above cited. The statute of 1839 was borrowed from Massachusetts, and had received judicial construction in that state before its adoption here. We felt bound by, and therefore followed, the adjudications in that state construing the statute, as will be seen by an examination of the opinion. We must adhere to the rule thus established. We therefore hold that the portion of the lands of which Mrs. Ahnert died seized, which descended to Franz, and by his death to the plaintiff (being one-eighteenth of the whole), is held by the plaintiff in the same manner as she holds the one-sixth thereof which came to her directly from her mother, and is subject to the same rules of law. If she can recover either of these undivided interests or portions in this action, she can recover both; failing to recover one of them, she cannot recover either.

It should be stated in this connection that Mr. Justice COLLE reserves his opinion on this point, but concurs in the other points herein decided.

IV. This brings us to the controlling question in the case: whether the plaintiff's cause of action is barred by the statute of limitations. Had she been unmarried in 1857, when the adverse possession of the defendant's grantor commenced, it is indisputable that her right would have been thus barred. But she was at that time, and ever since has been, a married woman. It is claimed for her that the statute has never com-

Wiesner vs. Zaun.

menced to run against her. This position is founded on the provisions of the R. S., ch. 138, sec. 13 (Tay. Stats., 1624, § 13). To this it is answered that the conditions of infancy, coverture, etc., mentioned in the statute, do not prevent the running of the statute any longer than while such conditions constitute *disabilities*; that the word "disability" is used in the statute in its technical, legal sense, meaning only "an incapacity of action under the law," or "an incapacity to do a legal act" (Burrill's Law Dic.); and hence, that the statute concerning the rights of married women (Laws of 1850, ch. 44; Tay. Stats., 1195), which gives to a wife the absolute control of her separate estate the same as though she were unmarried, and the provisions of another statute which permits her to sue alone in respect to such estate (R. S., ch. 122, sec. 15), removed the disability of coverture, and set the statute in motion against the plaintiff, more than ten years before she commenced her action. If these positions are well taken, the action cannot be maintained; and they are sustained by the adjudications of several most respectable courts, made under statutes quite similar to ours. *Brown v. Cousens*, 51 Me., 301; *Slater v. Cave*, 3 Ohio St., 80; *Ong v. Sumner*, 1 Cin. Superior Ct. R., 424; *Ball v. Bullard*, 52 Barb., 141. In the first of these cases, the principle upon which all of them were decided is tersely expressed, thus: "no disability, no exemption."

On the other hand, several other courts of equal respectability have held precisely the opposite doctrine. *Burke v. Beveridge*, 15 Minn., 205; *Bauman v. Grubbs*, 26 Ind., 419; *Dunham v. Sage*, 52 N. Y., 229.

The question has not been passed upon by this court, although it was raised and argued in *Ladd v. Hildebrant*, 27 Wis., 135. The conflicting decisions in other states have resulted in no decided weight of authority either way. We must therefore determine for ourselves the proper construction of the statute, in the light of the accepted rules of law applicable to the case.

It is apparent that the case turns upon the meaning of the word "disability," as used in the statute. The question is, whether it is there used in the restricted sense above mentioned, or has it a larger signification? Upon this question our views will be briefly stated.

1. It seems to us that the definition given by the learned counsel for the defendant, and apparently sanctioned by Burrill, is too narrow. The grounds of the disability of a wife are thus stated by Chancellor Kent: "The disability of the wife to contract so as to bind herself, arises not from want of discretion, but because she has entered into an indissoluble connection, by which she is placed under the power and protection of her husband, and because she has not the administration of property," etc. 2 Com. (11th ed.), 137. The law giving her the control of her separate estate removes only one of the grounds of disability. She is still under the control and protection of her husband. He can lawfully control her domicile and her employment. In these particulars she is now, as she was at the common law, under a degree of duress. Although she may have an action in her own name relating to her separate estate, and may administer the same as if unmarried, yet such *quasi* duress, which is a recognized element of legal disability, still remains.

2. But the section itself furnishes proof that the legislature did not use the term in the restricted sense claimed for it. One of the conditions mentioned in the section as preventing the running of the statute of limitations is that of persons "imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life." We suppose that persons in this condition may bring actions in their own names, notwithstanding their imprisonment. We find no statute to the contrary. We have a statute which provides for the service of process upon convicts in the state prison. R. S., ch. 188, sec. 23 (Tay. Stats., 1976, § 23). If they can be sued, manifestly their civil rights are not sus-

pended, and they may bring actions. Neither are we aware of any law which requires the appointment of a next friend or guardian for a convict plaintiff or defendant. In the absence of such a law, if the civil rights of the convict are not suspended, it necessarily follows that he may sue or be sued in his own name.

In New York there is a statute which suspends all of the civil rights of a person under sentence of imprisonment in the state prison for a term less than for life, during the term of his imprisonment. 3 R. S. (1859), Title 7, Part 4, ch. 1, § 29; *O'Brien v. Hagan*, 1 Duer, 664; *Miller v. Finkle*, 1 Parker's Cr. R., 374. In the revision of 1830, in which this provision stands as § 19, we find the following note by the revisors relating to that section: "New; taken substantially from Mr. Livingston's code, p. 29; declaratory of what is probably the law, although we have had no express decisions on the subject." 3 R. S. (1830), p. 835. It seems very clear that our statute, which provides for the service of process on convicts in the state prison, was enacted on the theory that, in the absence of any statute to the contrary, the civil rights of such convicts are not suspended during their imprisonment.

But however this may be, the exemption in sec. 13 of persons imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, extends to persons so imprisoned as well before as after trial, and to persons so in execution who have only been sentenced to imprisonment in a county jail. As a matter of course, the civil rights of such persons cannot be affected or impaired by the criminal charge or conviction. They may still control their property, make valid contracts, and sue and be sued in their own names. Otherwise the civil rights of a person imprisoned on a charge of assault and battery, or any other misdemeanor, whether before trial or after conviction and sentence, would be suspended. This would be simply monstrous. Yet the statute treats a

person thus imprisoned as under disability. Manifestly, it does not mean the disability which results from the total or partial suspension of civil rights, but that which results from duress. We cannot doubt that the term has the same signification when applied to the condition of coverture, which, as we have seen, is also, to some extent, one of duress.

3. The history of legislation in this state on the subject-matter of the statute under consideration, shows that the legislature never supposed that the exemption of married women from the operation of the statute of limitations had been taken away, until it was done directly in actions for the recovery of real estate, by the enactment of ch. 44, Laws of 1872.

Perhaps but little importance should be given to the fact that sec. 13 (which is found in substance in the revised statutes of 1839 and also of 1849) was reenacted in the revision of 1858, without material alteration, although the acts which it is claimed exclude married women from the benefit of that section, were then in force and were reenacted in the same revision. This fact is not, however, without significance. It is worthy of consideration when we are required, as we are in the present case, to determine whether a statute has been repealed by implication.

But there is another fact much more significant. When the act of 1872 was passed, amending section 13 by striking therefrom the 4th subdivision, so that its provisions should no longer apply to the condition of coverture, the legislature left untouched sec. 29 of the same chapter, which relates to nearly all personal actions, and which, in its effect upon such actions and in form, is very similar to sec. 13. If the legislature of 1872 supposed that the amendment to section 13 had already been made by implication, it could only have enacted ch. 44 for the purpose of clearing that section of useless rubbish; and in such case it would certainly have made the same amendment to section 29, and for the same reason. The failure to do so is strong if not conclusive evidence that the legislature

were of the opinion that both sections were unaffected by former laws. Hence, for satisfactory reasons no doubt, it amended one section and left the other in its original form.

4. The tendency and obvious purpose of all laws affecting married women which have been enacted in this state during the last twenty-five years, have been, almost without exception, to extend the privileges and immunities of that class of persons without imposing upon them corresponding liabilities and burdens. Keeping this fact in view, and remembering the principle that repeal by implication is not favored, we are impelled to the conclusion that the legislature, when it removed some of the disabilities of coverture, did not intend thereby to deprive the wife of any privilege or right extended to her by other statutes.

5. It must be conceded that very many of the old rules of law regulating the marital relation have been abrogated or materially changed by modern legislation. Those rules were the results of the wisdom and experience of centuries, and were believed by our fathers to harmonize with the Divine law which founded and sanctified that relation. Whether those rules have been departed from wisely or unwisely, is not for us to determine. But we are profoundly conscious that such legislation is fraught with danger, and that any errors therein must necessarily lead to disastrous results, the magnitude of which cannot well be overestimated. We have neither the power nor the inclination to advance in that direction only as we are compelled to do so by the clearly expressed will of the legislature. We must not accelerate the process of innovation and change by forced construction of statutes on the subject. Hence, until the legislature expressly so enact, we cannot hold that a wife is no longer under legal disability.

We conclude that the judgment of the circuit court, by which the plaintiff recovered the undivided one-sixth of the tract of land described in the complaint, which she inherited directly from her mother, and the undivided one-eighteenth

Wiener vs. Zaun.

thereof which she inherited from the same source on the death of her minor brother Franz in 1860, is correct and should be affirmed.

By the Court. — Judgment affirmed.

On a motion for a rehearing as to so much of the foregoing decision as relates to the one-eighteenth claimed by the plaintiff as derived through her brother Franz, *Mr. Winkler* argued that the decision rested on *Perkins v. Simonds*, 28 Wis., 90, and that in turn upon certain Massachusetts decisions; and that the conclusion reached is not sustained by *Perkins v. Simonds*. The doctrine of the latter case is merely this: that where one of several children, heirs of a common parent, dies under age and intestate, his brothers and sisters shall be entitled to his property inherited from such parent, in the same proportions as if they had taken it from the parent directly; and the law calls this, technically, taking as heirs of the parent as the ancestor, and not taking as heirs of a deceased brother or sister. That case turned on the meaning of the word "ancestor" in sec. 4, ch. 92, R. S. *Nash v. Cutler*, 16 Pick., 491 (which is chiefly quoted in *Perkins v. Simonds*), simply decides that the statute and doctrine in question do not apply where the children take *by will* from the father, but that in such case a mother inherits from a deceased minor child. *Sheffield v. Lovering*, 12 Mass., 490, merely states the effect of the statutes as to *who* take under it. *McAfee v. Gilmore*, 4 N. H., 391, holds that it does not apply where there is a will. *Crowell v. Clough*, 3 Foster, 207, and *Prescott v. Carr*, 9 id., 453, hold that under such a statute, upon the decease of one of the children unmarried and under age, brothers and sisters of the half blood do not participate in his share of the inheritance. This fully supports *Perkins v. Simonds*. But the doctrine of these cases, and the statute on which it is founded, are merely a rule of descent, designating who the heirs shall be upon the decease of a person; saying,

Wiesner vs. Zaun.

if you please, that *his* heirs shall not take, but the persons who would have taken if he had never been. *But the fact remains that he has been.* And if the statute requires this fact to be left out of view in determining *who shall be the heir*, it does not follow that it must also be left out of view in determining *the nature of the title* these heirs take as against third persons. When an heir takes from his ancestor, he takes the title just as the ancestor leaves it. But the subject of inheritance here, although derived from the ancestor, is not what the ancestor left, but what the *child* left. It is not, therefore, true that the surviving children take *in the same manner* as they would have taken if the deceased child had died before the ancestor. During the ownership of the child, the title may have been impaired, alienated or lost. It may have been mortgaged or sold through a guardian; sold for taxes; or lost by adverse possession, where his disability does not save it, as in *Woodbury v. Schackleford*, 19 Wis., 55. Indeed, where it is adversely possessed for ten years under color of title, *his disability* alone can save it. If sec. 13 of the limitation act did not include infants, it would be gone, though every other member of the family were a married woman or confined in the state prison. Is not this alone conclusive that his is the one disability which alone can interrupt the statute of limitations? 2. Suppose that Franz had been nine years old when his father died and defendant's possession became adverse, and had lived till he was twenty, then died leaving the plaintiff, his married sister, and his two brothers; both over twenty-six years of age: what would be the consequence under the doctrine of the opinion? Each would be held to have taken his share of Franz's portion from his mother, just as he took his own portion, and it would be governed by the same rules of law. The sister, therefore, having been under the disability of coverture when the title accrued, which disability still continues, can bring her action at any time during this coverture, and within five years after it shall cease; but the brothers, be-

ing more than five years removed from their own disability, are barred of their own original interest, and *therefore also of this*. Here, then, an estate is barred, against which the statutes of limitation have never run! 3. How can this rule be harmonized with the express provisions of sec. 13, ch. 138? It is conceded that the adverse possession commenced in 1857. The statute declares that if a person entitled to commence any action for the recovery of real property (as Franz clearly was), be, at the time such title shall *first* descend or accrue (it *first* descended and accrued to Franz), within the age of twenty-one years (as Franz was), the time during which such disability shall continue shall not be deemed, etc.; but such action may be commenced (no matter by whom) after the time limited, and within five years after the death of the person entitled (clearly Franz) who shall die under such disability; and that such action shall not be commenced after that period. This statute applies to the title descended to Franz, and to any one who may succeed to his title, whether *called* his heir, or, by a legal fiction his mother's heir. 4. The decision gives the plaintiff *one-third* of Franz's share. The opinion says: "The amount of the interest which she so took is of course increased by the death of Henry and of August after the death of their mother." But the doctrine of *Perkins v. Simonds*, as quoted from *Nash v. Cutler*, in 28 Wis., 95, is, that the inherited portion of a person dying as Franz did, "shall go just in the same manner as if such child had died during the lifetime of the ancestor, or, in other words, to those who would have taken the same share if such child had not existed." If Franz had died before his mother, or had never existed, each of the other children would have taken one-fifth of the estate, one-thirtieth more than they did take; and these one-thirtieth shares of Henry and August, by their deaths, have vested in their father, and by his conveyance and covenants have become the property of the defendant.

Wiesner vs. Zaun.

A rehearing was granted, and the cause was reargued at the August term, 1875.

E. P. Smith, for the respondent:

The subject matter of descent spoken of in subd. 7, sec. 1, ch. 92, R. S. 1858, is "*all the estate*" that came to the deceased child by inheritance from his deceased parent—not the remainder of the estate, or such as may be unalienated or undisposed of at the death of the child. The statute clearly recognizes a distinction between this case and that of a person dying intestate, leaving but one child and no issue of other children. In the latter case the inheritance would be absolute; but in the former case it would be conditional, depending on the child's marriage or his attaining his majority. In such a case the estate may be sold and the fee divested for debts of the ancestor (R. S., ch. 92, sec. 1), but not for those of the infant. On the father's death, the estate becomes as to his minor children a base or qualified fee, determinable as to each on his dying unmarried and a minor. If he survive that period, the condition is gone, and the estate becomes perfect. *Gilman v. Reddington*, 24 N. Y., 16. It is what may be called a fee simple contingent. *Hubbard v. Rawson*, 4 Gray, 246. If it or its possibility of ripening into an absolute fee could be conveyed or in any way alienated before the minor's marriage or majority, the determinable quality of the estate would follow the transfer, and on his death before marriage or majority, it would descend free from the alienation, as if the minor never had an existence or an inheritance. *Nemo potest plus juris in alium transferre quam ipse habet*. 4 Kent, 10. And even if the child's share could be alienated in any manner while he remained an infant and unmarried (which we deny), our rights would be the same, subject to that destruction. *Doe v. Martin*, 4 Term, 39. The result would not be the same to the surviving brothers and sisters in this case, if the property had descended directly from the deceased minor; for then it would have descended to him in

fee simple absolute, and so our title would have been barred by adverse possession, or at least our action must have been brought within five years after the death of the infant ancestor. In *Nash v. Cutler*, 16 Pick., 491, it was distinctly held that if the estate of the deceased infant had been received by inheritance (and not by devise), then by operation of the statute it would have descended from the father to the other children then living. The case holds that the whole purpose of the statute is the descent of the intestate father's estate to his children, and so, necessarily, that the heirs who ultimately get the fee simple absolute, derive it directly from the father. So in *Sheffield v. Lovering*, 12 Mass., 489, the court declares that the effect of the statute was "to place the estate in the same situation as if that child had died before the parent; * * * as if the parent had devised all his estate to such of his children as should arrive at full age or be married." In *McAfee v. Gilmore*, 4 N. H., 391, the doctrine is reasserted, and *Sheffield v. Lovering* approved. So in *Crowell v. Clough*, 3 Foster, 208, the court says that the statute "looks to the source from which the estate is derived, and for this purpose *regards the estate of the father as still in the course of distribution*," and that "the surviving children do not take under the general rule of descent as heirs and next of kin to the deceased brother or sister, but they take, under the special provision of the statute, the share of the deceased brother or sister, *as part of the parent's estate*." It follows that the survivors take the same title and in the same condition as if they had received it directly from the deceased parent. 2. Treating the estate of Franz Ahnert as a contingent estate, there could be during its continuance no adverse possession as against us; since our right of entry did not accrue until that estate terminated. *Jackson v. Harsen*, 7 Cow., 327. 3. The remark as to the increase of plaintiff's interest by the death of Henry and August, if error, doubtless crept into the opinion from the fact being overlooked that August and Henry were of full age

when they died; but it was in any event a harmless error, as the judgment below made no allowance for their interest.

Fred. C. Winkler, for appellant, contended that the cases followed in *Perkins v. Simonds* have never been understood as holding that where there are several children of the deceased intestate, the minor children do not take the fee simple, but merely an estate defeasable by their death in infancy unmarried. Guardians' sales made for the benefit of the infant ward under chaps. 93 and 96, R. S., have hitherto been universally supposed to convey titles in fee simple. If respondent's theory be correct, every such deed, where the property came from a parent by inheritance and there was more than one child, conveys but a contingent fee, which would determine on the death of the ward under age and unmarried. It would also follow from this view that the law in force at the time of the parent's death must control the descent upon the death of the child long after, although the law may at that time be wholly different, and may provide that the same heirs of the child shall take as in other cases. All that the statute, or the construction placed upon it in the cases cited, amounts to, is, that this inherited property is to go by a *different rule of descent* from property acquired by the child from other sources. The mere fact that the persons to whom it goes are the heirs of a deceased parent, may justify the construction, already somewhat artificial, that what they receive they take as heirs of the parent; but it certainly cannot be extended into the doctrine that they take a different estate, or, for the purposes of their own enjoyment, take with different rights from those which the heirs of the child would have if the statute did not exist. Our statutes of descent, like all statutes of that character, simply operate upon the property left, and as it is left, at the time of the death upon which they take effect. If there is any language in the Massachusetts cases which seems to go farther than this, it is purely *obiter*, and wholly unnecessary to support the decisions made in those cases. 2. Whatever theory

be adopted as to the statute of descents, the facts remain undisputed, that the adversely possessed title first *descended* and accrued to Franz; that he died under disability; and that the language of the statute therefore applies, that the action must be brought within five years. The statute was undoubtedly intended to apply, as it does in terms, to all cases where an heir dies under the disability. If, by an artificial construction, it shall be held not to apply to property descended from a parent to one of several children, it stands repealed as to a majority of cases occurring in actual life. 3. Upon the principle stated in the opinion filed in this case, Franz's one-sixth descended upon his death just as it would have done if he had never existed; therefore the two-thirtieths of Henry and August went, like their own original shares through their father, to the defendant; two other thirtieths went to the two surviving brothers; and only one-thirtieth to the plaintiff. The same result follows on the respondent's theory; each child became vested with a contingent reversion in Franz's share immediately upon the mother's death; the reversionary interests of Henry and August went to the father, and both became vested in defendant by the father's conveyance and covenants. The judgment below cannot be sustained on either of these theories; since either would give to the plaintiff only six-thirtieths or one-fifth of the land.

COLE, J. The counsel for the defendant criticises the language used in the former opinion, where it is said that the plaintiff took one-third of the share of Franz in the same manner she would have taken it if Franz had died before his mother. He insists that this statement of the rule of descent, if adhered to unqualifiedly, as laid down, will tend to shake all confidence in titles held under guardians' sales, and will startle the profession when authoritatively announced as the law of the state. For he argues that it is the logical result of the rule, where the heir takes from the ancestor, that

Wiesner vs. Zaun.

he takes the title just as the ancestor left it, while in the case under consideration the estate inherited is just what the minor child left at his death.

The language criticised by counsel is quite similar to that used by C. J. SHAW in *Nash v. Cutler*, while speaking of the purpose of a section of the statute of that state regulating the descent of intestate estate to children where one of them happens to die in infancy. And he said in that case that the provision intended that the infant's portion of the intestate's estate should go just in the same manner as if such child had died in the lifetime of the ancestor, or, in other words to those who would have taken the same share if such child had not existed. This language is sufficiently accurate when speaking of the general purpose of the statute. But while determining as to what estate was taken by the plaintiff on the death of Franz, it was not intended to affirm as an absolute rule that the other children would take the title on the death of the minor unaffected by any conditions, as though such minor had never in fact existed. That is to say, it is not decided that if the estate of Franz had been sold for his support and maintenance, or for his education, as it might have been under the statute, the purchaser would not have acquired a perfect title. The purchaser at the guardian's sale would take the title, and that title would not be divested on the infant's death, so as to go to the surviving children in the same manner as if such infant had died in the lifetime of the ancestor. So that it is quite true, as argued by counsel, while we regard the inheritance as coming from the ancestor in order to give it according to the statute to the other children, still we must and do consider whether there are any facts and circumstances affecting the share which descended to the infant, which take it out of the rule. The existing condition of the title is regarded; and when the property has been sold at a guardian's sale for the benefit of the infant, the provision regulating descent does not apply.

Berrinkott vs. Traphagen and another, impleaded.

But it is further said that if the rule of descent stated in the opinion be correct, still the fact remains undisputed, that the adversely possessed title first descended and accrued to Franz; that he died under disability; and that therefore the action in respect to his share of the inheritance must be brought within five years, under sec. 13, ch. 138, R. S. Under the construction which we were compelled to place upon the statute of descent, we are unable to see how the statute of limitations can apply to the case. This may result in inconsistency and a want of harmony in the law. I have already stated (*Wescott v. Miller*, unreported), that if the question were unembarrassed by the doctrine of the Massachusetts cases, I never could give the statute of descent the construction which has been placed upon it by the courts of that state. But, for reasons already given in other cases, we feel bound by the judicial interpretation which the statute had received before it was adopted here.

It results from these views that the decision of the circuit court must be affirmed.

By the Court. — Judgment affirmed.

BERRINKOTT VS. TRAPHAGEN and another, imp.

BOND. (1) *Penalty or liquidated damages?* (2) *Exercise of obligee's option on breach of bond; and notice thereof to obligor.*

1. Before the bond secured by the mortgage in suit was made, the obligee and her husband conveyed to the obligor a farm, and in consideration of such conveyance said bond was executed, in the penal sum of \$900, and conditioned that if the obligor, one year after the death of the obligee's husband, and annually thereafter during her natural life, should pay her the amount of the interest of \$464 at seven per cent. per annum, the bond should be void; but if any default should be made in the payment of said interest on any day whereon the same was payable, and it

Berrinkott vs. Traphagen and another, impleaded.

should remain unpaid for thirty days, the principal sum of \$464, with arrearages of interest, should, at the option of the obligee, become due and payable immediately; and that if the payments of interest were promptly made during the obligee's life, the debt and mortgage should cease at her death. *Held*,

(1) That notwithstanding the mention of \$900 as the penalty, the sum of \$464 which the obligor covenants to pay upon breach, at the obligee's option, might in a proper case be treated as a penalty; and that in such case the measure of the obligee's recovery would be the gross value of the annuity when she declared her option, and arrears of interest.

(2) That as said sum of \$464 was not fixed to evade the usury law or other statutory provisions, or to cloak oppression, and as, independently of the stipulation, the damages would be uncertain, because the real value to this obligee of the payment of the stipulated annual interest cannot be determined by reference to any tables of mortality, or by any other means, said sum must be treated as *liquidated damages*, no facts appearing which would make it inequitable to enforce the contract according to its terms.

[RYAN, C. J., dissents, holding that the principal sum named is obviously greater than the value of the annuity could ever be; that it must be presumed, in the absence of all proof, that the annuitant could purchase the same annuity elsewhere at reasonably certain market rates; that the cost of such annuity is the precise measure of her damages; and that under such circumstances the sum named in the bond should be treated as a *penalty*.]

2. The interest which became due on said bond on the 16th of September of each of three successive years remaining unpaid, the obligee, on the 25th of November of the last of said years, notified the obligor, in writing, of her election to consider the principal sum, with arrearages of interest, due and payable immediately. The obligee resided in Dane county, Wisconsin, and the obligor in Nebraska. *Held*, that the option given could be exercised within a reasonable time after *any* default; and that, under the circumstances, the notice was served within a reasonable time.

APPEAL from the Circuit Court for *Dane* County.

Action to foreclose a mortgage. In 1864, the plaintiff and her husband, Adolph Berrinkott (now deceased), conveyed to the defendant Henry Mausbach, their son-in-law, a farm in Dane county; and for the consideration or price of the farm, or for a portion of it, the grantee executed to the plaintiff a bond in the penal sum of \$900, the condition of which is thus stated in the complaint: "The condition of the said bond

Berrinkott vs. Traphagen and another, impleaded.

was such that if the above named defendant, the obligor therein, should well and truly pay or cause to be paid unto the above named *Sybilla Berrinkott*, the plaintiff, her executors, administrators or assigns, one year after date of the death of Adolph Berrinkott (who was then the husband of the plaintiff), and annually thereafter during her natural life, the sum of the interest on the sum of four hundred and sixty-four dollars at the rate of seven per cent. per annum, then the said bond to be void, otherwise of force; and it was in said bond expressly agreed and conditioned that should any default be made in the payment of the said interest or any part thereof, on any day wherein the same was made payable by said bond, and the same should remain unpaid and in arrears for the space of thirty days, then and in that case the said principal sum of four hundred and sixty-four dollars, with arrearages of interest thereon, should, at the option of the said *Sybilla*, the plaintiff, become and be due and payable immediately thereafter, anything therein to the contrary notwithstanding; and it further thereby was expressly agreed that if the payments of said interest were promptly made after the death of the said Adolph and before the death of the said plaintiff, and during her natural life, then at her death said debt and said mortgage should cease and be null."

At the same time the grantee and his wife, Margaretha, executed to the plaintiff the mortgage in suit to secure the performance of the conditions of such bond. Adolph Berrinkott died September 16, 1869. The interest or annuity which became due by the terms of such condition in 1870 and 1871, was paid; but no other or further payments on account thereof have been made. On the 25th of November, 1874, the plaintiff caused a notice in writing to be served on the defendant Henry Mausbach, declaring her election to consider the principal sum named in the bond, with arrears of interest, due and payable presently. The appellants are subsequent incumbrancers. The foregoing facts appear from

Berrinkott vs. Traphagen and another, impleaded.

the pleadings and proofs and the findings of the circuit judge.

The court rendered the usual judgment of foreclosure and for the sale of the mortgaged premises, and the payment to the plaintiff, out of the proceeds of such sale, of the said sum of \$464, with arrears of interest thereon, together with the interest subsequently accruing, and costs. This appeal is from such judgment.

B. J. Stevens, for appellants:

1. If the plaintiff had a right to declare the whole sum due on the bond and mortgage, such right should have been exercised at the time an installment became due, or immediately after. *Hall v. Delaplaine*, 5 Wis., 206. 2. The plaintiff, having notice that the defendants had purchased the equity of redemption on foreclosure of a second mortgage, should have served on them notice of his election to have the whole sum become due. 3. The principal sum was not made payable to the plaintiff, and not secured by the mortgage. She has only a life interest in the principal. If the court of equity would compel the purchasers of the equity of redemption to pay the principal sum, it should only be for the purpose of having the same invested, and the annual interest thereof paid to the plaintiff. 4. Equity will relieve against conditions subsequent, whenever compensation can be made. In this case interest would be full compensation; hence the judgment should have been only for the installments of interest due, and costs of suit up to the time of the offer to pay. *Rogan v. Walker*, 1 Wis., 527; 4 Kent's Com., 129. Penalties and forfeitures are not favored in the law, and equity will generally relieve from them when compensation can be made. *Hagar v. Buck*, 44 Vt., 285; *Grigg v. Landis*, 21 N. J. Eq., 494.

Vilas & Bryant, for respondent:

1. No exceptions to the finding were filed within the time prescribed by statute. This court will therefore only look into the case to see whether the pleadings and finding sustain

Berrinkott vs. Traphagen and another, impleaded.

the judgment. *Wis. Imp. Co. v. Lyons*, 30 Wis., 61; *Blossom v. Ferguson*, 13 id., 84; *Geekie v. Wells*, 37 id., 362; *Haney v. Clark*, 1 Pin., 301; *Doty v. Strong*, id., 313. 2. This case does not come within the rule that "equity will relieve against a forfeiture." It is of a class of contracts constantly enforced in equity. *Basse v. Gallegger*, 7 Wis., 442; *Marine Bank v. Int. Bank*, 9 id., 57; *Schoonmaker v. Taylor*, 14 id., 313; *Rosseel v. Jarvis*, 15 id., 571; *Gulden v. O'Byrne*, 7 Phila., 93; *Schooley v. Romain*, 31 Md., 574; *Robinson v. Loomis*, 51 Pa. St., 78; *Valentine v. Van Wagner*, 37 Barb., 60; *Kramer v. Rebman*, 9 Iowa, 114. In determining whether a provision in a contract is in the nature of a penalty, courts will consider *the circumstances of the case, the situation of the parties, and the consideration*. *Hodges v. King*, 7 Met., 582; *Green v. Price*, 13 M. & W., 675; *Gulsworthy v. Slinitt*, 14 id., 187; *Randolinson v. Clark*, 1 Exch., 659; *Atkins v. Kennier*, 4 id., 776; *Hardee v. Howard*, 33 Ga., 533; *Sutton v. Howard*, id., 536; *Baldwin v. Van Vorst*, 1 Stockt. Ch., 577; *Gulden v. O'Byrne*, *supra*. Applying these tests to the evidence in this case, equity ought not to interfere with the bond. 3. The appellants have not shown that they will be injured by the judgment; they have not shown that the land is an insufficient security for the plaintiff's judgment and their own. *Boyd v. Sumner*, 10 Wis., 41; *Jamison v. Gjemenson*, id., 411; *Mann v. Thayer*, 18 id., 479; *Young v. Schenck*, 22 id., 560. At the time of the trial below it did not appear but that the premises would be redeemed from appellants' foreclosure sale. Nor did the appellants show that Mausbach was insolvent. 4. The appellants had no right to notice of option to deem all due. *Schoonmaker v. Taylor*, 14 Wis., 313.

LYON, J. It is claimed on behalf of the plaintiff, that no exceptions to the findings of fact were filed within the time prescribed by statute, and hence that such findings cannot be

Berrinkott vs. Traphagen and another, impleaded.

reviewed on this appeal. We do not find it necessary to determine whether this position is well taken, for the testimony has been examined, and we are satisfied that it sustains all of the material findings of fact.

We think also that the notice to the obligor that the plaintiff exercised the option reserved to her in the bond, was given in due time. A payment of \$32.48 became due September 18, 1874, and the thirty days mentioned in the bond before such option could be declared, expired on the 16th of October. On the 25th of November, 1874, the plaintiff caused to be served on the obligor, at his residence in the state of Nebraska, a notice in writing of her election that the whole sum of \$464, and the arrears of interest thereon, should become due and payable immediately; payment of which was demanded. Although there were previous defaults, we cannot doubt that it was competent for the plaintiff to exercise her option within a reasonable time after any default; and when it is considered that the obligor had removed to a distant state, a period of less than six weeks in which to find and procure service of the proper notice upon him, does not seem to be an unreasonable time.

It is clear that the plaintiff is entitled to a judgment of foreclosure; and the only remaining question, and the most important one in the case is, What sum is due upon the bond which the mortgage in suit was given to secure? The learned circuit judge held that the parties to the bond had therein liquidated the sum which the obligor should pay upon default (if the plaintiff chose to declare her option) at \$464, and arrears of interest thereon, and that the case is a proper one for the enforcement of a covenant to pay stipulated damages for a breach of the condition of the bond; and the judgment is upon that basis. But it is contended on behalf of the appellants, that this is error; that the gross sum to which the plaintiff is entitled is not \$464, but only the value of a life annuity of \$32.48 at the time the plaintiff declared her option, at which time she was fifty-two or fifty-three years of age.

Berrinkott vs. Traphagen and another, impleaded.

Such value, computed by the Northampton tables, was then a little less than \$300.

The form of the covenant is, that in case of default in making any annual payment the whole debt or obligation should become due and payable at once, at the option of the plaintiff; and if it should become so payable, the covenant fixed the amount thereof at \$464, and arrears of interest thereon. So far as *form* is concerned, the penalty of the bond is \$900, and the stipulated damages, in case of a breach of its conditions, are \$464. *Fletcher v. Dycke*, 2 Term, 32; *Astley v. Weldon*, 2 Bos. & Pul., 346.

But it by no means follows, because the covenant is in form for the payment of a stipulated sum, that the plaintiff must necessarily recover that sum. In many cases the sum named in such covenants has been held to be only a penalty. Should it be so held in this case, then, clearly, the measure of the plaintiff's recovery would be the gross value of the annuity when she declared her option, and arrears of interest. In *Yenner v. Hammond*, 36 Wis., 277, the chief justice says: "Whatever words are used in a covenant providing a sum for damages upon breach, the mere words are not conclusive, and courts ought, in the language of C. J. ABBOTT, to look into the whole of the agreement in order to ascertain whether the sum was intended to be a penalty or liquidated damages. *Davis v. Penton*, 6 Barn. & Cress., 216; Sedgwick on Damages, 421, and cases cited." In 3 Parsons on Con., 156, we find this language: "The law will permit parties to determine by an agreement which enters into the contract, what shall be the damages which he who violates the contract shall pay to the other; but it does not always sanction or enforce the bargain they may make on this subject. Damages thus agreed upon beforehand, when sanctioned by the law, are called liquidated damages. Where the parties make this agreement, but not in such wise that the law adopts it, then the damages thus agreed upon are a penalty, or in the nature of a penalty."

Berrinkott vs. Traphagen and another, impleaded.

The question remains, therefore, notwithstanding the form of the covenant, whether the \$464 named therein is to be treated as liquidated damages, or considered as a penalty, or in the nature of a penalty. The rules by which this question is to be determined, are thus stated by Mr. Sedgwick: 1. If the sum be evidently fixed to evade the usury laws or any other statutory provisions, or to cloak oppression, the courts will relieve by treating it as a penalty. Consequently, whenever the sum stipulated is to be paid on nonpayment of a less sum made payable by the same instrument, it will be held a penalty. 2. Where independently of the stipulation the damages would be wholly uncertain, and incapable or very difficult of being ascertained except by mere conjecture, there the damages will usually be considered liquidated, if they are so denominated in the instrument. These rules received the approval of this court in *Pierce v. Jung*, 10 Wis., 30. See also *Fitzpatrick v. Cottingham*, 14 id., 219; *Ryan v. Martin*, 16 id., 57; *Laubenheimer v. Mann*, 19 id., 519.

The same rules are stated in another form in *Bagley v. Peddie*, 5 Sandf., 192, by SANDFORD, J., as follows: "1. If the instrument provide that a larger sum shall be paid on the failure of the party to pay a less sum in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it. 2. When the covenant is for the performance of a single act, or several acts, or the abstaining from doing some particular act or acts, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any such covenants, the sum is to be deemed liquidated damages, and not a penalty. The cases of *Reilly v. Jones*, 1 Bing., 302; *Smith v. Smith*, 4 Wend., 468; *Knapp v. Maltby*, 13 id., 587; *Dakin v. Williams*, 17 id., 447; *S. C.* in error, 22 id., 201, were of this class."

To the same general doctrine we cite the following late cases: *Powell v. Burroughs*, 54 Pa. St., 329; *Wolf Creek Co.*

Berrinkott vs. Traphagen and another, impleaded.

v. Schultz, 71 id., 180; *Trustees, etc., v. Walrath*, 27 Mich., 282; *Smith v. Hamilton*, 3 Daly, 462; *Morris v. McCoy*, 7 Nev., 399.

It is very certain that the sum fixed in the covenant before us was not intended to evade the usury laws or any other statutory provision; and it is not perceived how it could have been intended to cloak oppression or injustice. The covenant was voluntarily made by the obligor, and, so far as appears, he received therefor full value for the sum which he agreed to pay, at the option of the obligee, in case of default. The most that can be said against the justice of it is, that the damages would be the same if default were made and the option declared at a much later period in the life of the obligee. But that is a contingency which it may be fairly presumed the obligor took into consideration when he made his covenant; and it was always in his power to prevent the happening of such contingency by paying the annuity which he covenanted to pay. If the views above expressed are correct, it follows that the sum named in the bond is to be regarded as stipulated damages, unless the gross value of the life annuity can be ascertained by some exact pecuniary standard.

Were this a covenant to pay a specified annuity for a certain number of years, there would be no difficulty whatever in making an exact computation of the gross value thereof at any given time. In such a case, the first of the above rules would govern, and a greater sum named in the bond as stipulated damages would be treated as a penalty, or as being in the nature of a penalty. But in the case before us an essential element or factor is wanting. It is impossible to know how long the annuity would continue, for that depends upon the duration of the life of the obligee. Hence, it seems to me that the gross value of the annuity when the plaintiff declared her option, is not measurable by any exact pecuniary standard; and that the second rule above stated must control the case.

Berrinkott vs. Traphagen and another, impleaded.

It was argued that such value can be ascertained by reference to accredited tables giving the present value of life annuities at different periods in the lives of the annuitants. Those tables are based upon extensive observations of the duration of human life, and, as statements of average results, are doubtless approximately correct. But when applied to an individual case, the element of exactness is wanting. A writer on this subject says: "With respect to the price or real value of life annuities, they are seldom regulated by any strict rules of arithmetic; for, notwithstanding the great ingenuity of De Moivre, Dr. Price and others in calculating tables for regulating the same, yet there are few instances in which any rules laid down in these tables have been adopted. The various circumstances connected with individual annuities, such as the age, constitution and necessities of the borrower, the value and supply of money in the market, the nature of the securities, etc., must necessarily render the use of such tables somewhat partial, and in many instances totally impracticable. The rules laid down in these tables are of too intricate and complex a nature to be generally adhered to, and may in all cases be better adapted to the periods in which they were calculated, than to the present time." Blayney on Life Annuities, 28. This extract suggests considerations why a computation of the present value of a life annuity from those tables is uncertain and unsatisfactory, and may be unjust. It is understood that there are different tables of the kind in use. Those which are probably most frequently resorted to by the courts are denominated the Northampton tables. I am not familiar with the history of any of these, and do not know when the Northampton tables were framed, but suppose them to have been, when prepared, as nearly accurate as practicable. We have no statute or rule of court on the subject in this state; and should it become necessary, in any of our courts, to ascertain the present value of a life annuity, the court would be compelled, *ex necessitate rei*, to resort arbitrarily to some

Berrinkott vs. Traphagen and another, impleaded.

annuity tables for that purpose. In New York the Northampton tables have been adopted by rule of court. Rule 85, S. C., Wait's Annotated Code, 871, 881. I should prefer, however, to resort to those prepared more recently, and based upon the average duration of life in this country. I am led to believe that such tables exist, and are used by some life insurance companies in this country, and that they show a higher average duration of life than is shown by the Northampton tables. However, I may not be correctly informed in this behalf.

These observations are made for the purpose of showing that if the present value of a given life annuity be computed from such tables, the result is, to a considerable extent, conjectural and uncertain. Indeed, it seems to me quite certain that the result will not give the actual present value, but will be unjust either to the annuitant or to the person who is liable to pay the annuity. This being so, it seems very proper that when the annuity is created, the parties to it should stipulate some reasonable sum which should be paid in gross in lieu of the annuity, upon the happening of a contingency making a gross sum payable. I cannot doubt that this was done in the present case; and it seems to me that the court should enforce the contract of the parties as they made it.

I think that the judgment of the circuit court should be affirmed.

COLE, J. I concur in the above opinion of Mr. Justice LYON.

RYAN, C. J. In *Yenner v. Hammond*, 36 Wis., 277, cited in the opinion of the court in this case, it is said that the court would be as reluctant to give a covenant effect to convert damages liquidated by law into a penalty, as to give a covenant effect to convert a penalty into liquidated damages. Such a reluctance constrains me to dissent from the judgment

Berrinkott vs. Traphagen and another, impleaded.

of my brethren, in this case, that the sum provided to be paid, in the condition of the bond, at the option of the obligee, upon the obligor's failure to pay the annuity, is liquidated damages and not a penalty. I am not disposed to discuss the question at large, but only to state briefly the grounds on which I consider the sum in the nature of a penalty.

Professor Parsons gives a very satisfactory statement of the principle on which I rest my opinion. Speaking of the distinction between penalties and liquidated damages, he says: "Among the principles which have been found useful in determining this question, perhaps the most important and influential are these: The sum agreed upon will be treated as a penalty, unless, first, it is payable for an injury of uncertain amount and extent; and, second, unless it be payable for one breach of contract, or, if for many, unless the damages to arise from each of them are of uncertain amount." 3 Parsons on Con., 159.

The first of these rules applies to cases where the law gives a fixed rule of computing damages. In such cases, parties are not at liberty to set aside the rule of law, and to substitute a rule of their own, "to cloak oppression." Sedg. on Dam., 421. And, on this principle, I am unable to regard the fixed sum here as other than a penalty.

The condition of the bond is to pay the amount of interest on the sum certain to the obligee, annually after the death of her husband, for her life; failing to pay it any year, then, at her option, to pay the sum certain itself, with arrearages of interest. It is of course perfectly obvious that the annuity for life of the interest is of less value than the principal sum on which the interest is computed. It is also as obvious that the annuity was of wholly uncertain value when the bond was given, because it was to run only from a future uncertainty. It is also as obvious that the value of the annuity, when default should be made in its payment, would vary materially according to the time of default. And yet the condition of the bond

Berrinkott vs. Traphagen and another, impleaded.

fixes one sum certain, irrespective of all these uncertainties and contingencies and differences, for damages upon failure to pay the annuity whensoever the annuity might begin to run, or whensoever the default might happen; and that sum greater than the value of the annuity could ever be. It is quite apparent that the sum fixed to be paid upon default was not intended to bear, as it does not bear, any proportion to the actual damages to the obligee by the obligor's failure to keep his agreement. It looks very like fixing the value of the fee for failure at any time to pay rent under a lease for life. It seems to me probable that the fixed sum was one-third of the ascertained value of the land conveyed, the interest on which while she should survive her husband would be precisely the obligee's right as doweress; and that the penalty on default is to substitute in effect a fee in one-third of the land for a life estate. The sum fixed appears to me almost as clearly a penalty as the penalty of the bond itself.

Whether there are tables by which the court below could satisfactorily ascertain the value of the annuity, I do not stop to consider. It is a presumption, in the absence of all proof, that the annuitant could purchase the same annuity elsewhere, at reasonably certain market rates. And the sum which would purchase for her the same annuity from some safe public company or from some private party securing it by mortgage, was the precise measure of her damages by the obligor's failure to pay it. *Id certum est quod certum reddi potest*. The damages of the annuitant cannot be said to be uncertain. And, if there had been no such stipulation in the bond, and a jury had assessed her damages at the fixed sum, I do not see how a court could avoid setting the verdict aside as excessive. See *Pierce v. Jung*, 10 Wis., 30; *Fitzpatrick v. Cottingham*, 14 id., 219.

By the Court. — Judgment affirmed.

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

In the Matter of the Motion to admit Miss LAVINIA GOODELL
to the Bar of this Court.

CONSTITUTIONAL LAW. *Women not admitted to the bar of this court.*

1. Whether the constitution of this state, by vesting the whole judicial power in the courts therein provided for, does not entrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts, *quære*.
2. To entitle any person to practice in this court, the statute requires that he shall be licensed by its order, and no right to such an order can be founded on admission to the bar of a circuit court. Tay. Stats., ch. 119, §§ 31-33.
3. The language of the statute relating to the admission of attorneys (which declares that "he shall first be licensed," etc.) applies to males only; and the statutory rule of construction, that "words of the masculine gender may be applied to females," "unless such construction would be inconsistent with the manifest intention of the legislature" (R. S., ch. 5, sec. 1), cannot be held to extend the meaning of this statute, in view of the uniform exclusion of females from the bar by the common law, and in the absence of any other evidence of a legislative intent to require their admission.
4. There is nothing in the statutes of this state providing for the admission of females to the state university which shows a legislative intent to require the admission of females to the bar.

On the 14th of December, 1875, *I. C. Sloan, Esq.*, moved the court for the admission to the bar of this court of Miss R. Lavinia Goodell, and read to the court a certificate of the clerk of the circuit court for Rock county in this state, which stated that at a term of said court begun and held on the 17th of June, 1874, Miss Goodell was examined in open court, and that, it appearing that she was a resident of this state, more than twenty-one years of age, of good moral character, and possessed of sufficient legal knowledge and ability, she was duly admitted by said court as an attorney and counselor at law. *Mr. Sloan* argued substantially as follows:*

* *Mr. Sloan* desires to have it stated that the argument read by him on the hearing of this motion was prepared by Miss Goodell. — REP.

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

Tay. Stats., 1343-4, §§ 31-33 (which are the same as secs. 1-3, ch. 189, Laws of 1861), are in these words:

"§ 31. No person shall hereafter be admitted or licensed to practice as an attorney of any court of record in this state, except in the manner hereinafter provided.

"§ 32. To entitle any such person to practice as such attorney in the circuit courts of this state, he shall be first licensed by order of one of the judges thereof, made in open court; and no such order shall be made until the person applying for such license shall have first been examined in open court, by the judge thereof, or examiners by him appointed, as to his learning in the law and ability to practice as such attorney, nor until such judge shall be satisfied that such person possesses sufficient legal knowledge and ability to entitle him to practice as such attorney, nor unless such person be a resident of this state, more than twenty-one years of age, and of good moral character. His residence and age must be made to appear by his affidavit.

"§ 33. Any person licensed by order of the court, as provided by section two of this act [§ 32], shall be entitled to practice as attorney of any court of record of this state except the supreme court; and to entitle any person to practice as attorney in the supreme court, he shall first be licensed by order of such court."

There is nothing in these provisions which can be construed to debar a woman from a license under them, unless it be the use of the masculine pronoun. But, by statute relating to the rules of interpretation, "every word importing the masculine gender only may extend and be applied to females as well as to males." Tay. Stats. p. 181; R. S., ch. 5, sec. 1, pl. 2. This rule of interpretation is followed in the construction of all the statutes; and there appears no reason why it should not be applied to the particular statute under consideration, as well as to the statutes generally. It has been so applied to the statute providing for notaries public, and defining their duties,

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

under which Miss Goodell has been appointed and now holds the office of notary.

Nothing appears, then, in the laws of the state tending to disqualify an applicant for admission to the bar, in consequence of her sex; and there is no rule of this court modifying the statutes in that respect.

The supreme court of Illinois, in their opinion delivered in September, 1869, upon the application of Mrs. Bradwell, held that the admission of women to the practice of law was without precedent, unknown to the common law, and not within the thought and intention of the legislature at the time the statute providing for the admission of attorneys to practice was enacted. The court say: "When our act was passed, that school of reform which claims for woman participation in the making and administering of the laws had not arisen, or; if here and there a writer had advanced such theories, they were regarded rather as abstract speculations than as an actual basis for action. * * * In view of these facts we are certainly warranted in saying that when the legislature gave to this court the power of granting licenses to practice law, it was with not the slightest expectation that this privilege would be extended equally to men and women. Neither has there been any legislation since that period which would justify us in presuming a change in the legislative intent." Whatever may be said of the applicability of this argument to that case, it is wholly inapplicable to this. The statute of Illinois providing for the admission of attorneys was enacted in 1845, or earlier, being found in the revised statutes of that state for 1845. The statute of Wisconsin here cited was enacted in 1861, when progressive ideas concerning the enlargement of the sphere of woman's industries were more widely known and adopted, and so may reasonably be presumed to have been within the minds of the legislators at the time of its enactment. But further legislation in this state clearly indicates that, whatever the intention of the

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

legislators in 1861 might have been — if other than that expressed by plain and unequivocal language, — their subsequent intention has been to include women in the provisions made for the admission of attorneys to practice in all the courts of record in this state. By ch. 17 of 1867, women are admitted to every department, except the military, of the state university, “under such regulations and restrictions as the board of regents may deem proper.” *Tay. Stats.*, 521. This statute admits women to the law department of the university, with the privilege of pursuing the course of study marked out for its students, and of graduating from that department. Whether the clause, “under such regulations and restrictions as the board of regents may deem proper,” gives said board power to exclude women from the full legal course and the privilege of graduating, or not, it certainly gives them power to allow to women students such full course of study and graduation, if they see fit to do so. Now, by the laws of 1870, ch. 79, sec. 1, “all graduates from the law department [of the state university] shall be entitled to admission to the bar of all the courts of this state, upon presenting to the judge or judges thereof a certificate of such graduation.” *Tay. Stats.*, 1344, § 36. Thus, by express legislative enactment, women may be admitted to the bar of all the courts of this state by graduating from the law department of the state university. Can it have been the intention of the legislature to give the board of regents of the university the power to admit women to the practice of law in this court, and at the same time to withhold that very power from the court itself? Again, the statute provides for the admission of attorneys from the state of Illinois and other states, under certain restrictions which do not apply to the question of sex. See *Tay. Stats.*, 1344–5, §§ 39, 40. Accordingly women may be admitted to this bar from Illinois and other states in which they are now or may hereafter become practicing attorneys. If the courts of other states have power to procure the admit-

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

tance of women to the bar of this state, are its own courts deprived of such power? Again, the constitution of this state, art. VII, sec. 20, provides for the conduct of suits by a party, or his attorney or agent. Under this clause of the constitution no court would have the right or power to refuse a woman, as a party or agent, the right to conduct a suit in court on her own behalf or that of her principal.

Upon application made in 1869 to the supreme court of Illinois, Mrs. Bradwell was refused admittance, October 6, 1869, on the sole ground that she was a married woman, and as such was incapable of making contracts. *Ch. Legal News* of Feb. 5, 1870. Mrs. Bradwell filed an argument, the most pertinent point in which was that, by statutes enacted by the legislature of Illinois in 1861 and 1869, giving to a married woman the right to hold property in her own name, to control her own earnings, and to sue and be sued, the disabilities asserted by the court to exist, had been removed, and could no longer form a barrier to her admission to legal practice. The court, in a subsequent opinion, while still denying Mrs. Bradwell's application, refused it no longer on the ground of her disabilities as a married woman, but solely on the ground of her being a woman. While virtually admitting that nothing in the language of the statute precluded the admission of women, the court laid down this rule: "In all other respects [aside from the limitations of the statute], it is left to our discretion to establish the rules by which admission to this office shall be determined. But this discretion is not an arbitrary one, but must be held to at least two limitations. One is, that the court shall establish such terms of admission as will promote the proper administration of justice; the second, that it should not admit any person or class of persons who are not intended by the legislature to be admitted, even though their exclusion is not expressly required by the statute." No argument was made upon the first limitation enumerated, and

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

the refusal to admit the applicant was based solely upon the second.

None of the arguments urged in opposition to the claim of Mrs. Bradwell for admission apply to this case. The applicant here is not a married woman, and is under no disabilities. But even if she were married, the recent legislation of Wisconsin, giving to married women the right to control their own property and earnings and to sue and be sued, removes their disabilities to contract, as in the case of similar legislation in Illinois, and so removes the barrier supposed to have existed, to her admission to legal practice. See Tay. Stats., 1195-6, and decisions there cited; Laws of 1850, ch. 44; Laws of 1855, ch. 49; Laws of 1872, ch. 155. The inapplicability to this case of the argument upon which the *second* refusal was based, has already been shown.

One of the limitations to the discretion left by legislation to the court, as specified by the supreme court of Illinois, was, "that the court shall establish such terms of admission as will promote the proper administration of justice." No argument was made against the admission of women under this head; and it is submitted that "the proper administration of justice" would be better promoted by the admission of women to the practice of law than by their exclusion, for these reasons among others:

1. That a class wholly unrepresented in courts of justice can never obtain full justice in such courts; and that when that class is so numerous as to include one-half the human race, the promotion of "the proper administration of justice" requires that they be represented.

2. That a union of the peculiar delicacy, refinement, and conscientiousness attributed to woman, with the decision, firmness, and vigor of man, are not only desirable but necessary in promoting "the proper administration of justice" in our courts.

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

3. That in excluding woman from the practice of law, an injustice is done the community in preventing free and wholesome competition of the best existing talent.

4. That a great injustice is done to one-half the community, by shutting them out arbitrarily from an honorable and remunerative field of industry, for which many of them have both taste and ability.

Besides the case of Mrs. Bradwell, the only known decision apparently adverse to the admission of woman to the practice of law, is that of Mrs. Belva Lockwood, who was refused admission to the court of claims, Washington, D. C., in 1874, solely on the ground of her disabilities as a married woman. See Ch. Leg. News, May 23, 1874.

The following precedents are in favor of the admission of women:

Iowa. — In 1869, Mrs. A. A. Mansfield was admitted to the bar of Iowa under a statute providing that "any white male person," with the requisite qualifications, should be licensed to practice; by virtue of the statute providing that "words importing the masculine gender only may be extended to females;" and the court held that the affirmative declaration that male persons may be admitted, is not an implied denial of the right to females. See Ch. Leg. News, Feb. 5, 1870, Mrs. Bradwell's case.

Missouri, under a statute providing that "any person" possessing certain qualifications, "may be licensed," admits women to all courts of the state, including the supreme court. Miss Barkalow's case, Ch. Leg. News, April 3 and April 9, 1870.

Michigan, under a statute using the word "citizen" as the statute of Wisconsin uses "person," admits women to practice.

Under a statute of Maine similar to that of Wisconsin, a married woman, Mrs. C. H. Nash, was admitted to the supreme court of that state in October, 1872. See Ch. Leg. News, Oct. 26, 1872; R. S. Maine, p. 597, sec. 18.

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

District of Columbia.—Miss Charlotte E. Ray was admitted on graduating from Howard University, about 1873.

The federal district court of Illinois admitted Miss Hewlitt. See Ch. Leg. News, May 23, 1874.

The federal district court of Iowa has also admitted a woman.

Illinois and Iowa have provided by special legislation for the admission of women, on its appearing a question of doubt whether previous statutory provision was intended to include them.

Ohio provides for the admission of any person complying with certain specified regulations. I understand that a woman has been admitted under this statute, but cannot give reference.

RYAN, C. J. In courts proceeding according to the course of the common law, a bar is almost as essential as a bench. And a good bar may be said to be a necessity of a good court. This is not always understood, perhaps not fully by the bar itself. On the bench, the lesson is soon learned that the facility and accuracy of judicial labor are largely dependent on the learning and ability of the bar. And it well becomes every court to be careful of its bar and jealous of the rule of admission to it, with the view of fostering in it the highest order of professional excellence.

The constitution makes no express provision for the bar. But it establishes courts, amongst which it distributes all the jurisdiction of all the courts of Westminster Hall, in equity and at common law. *Putnam v. Sweet*, 2 Pin., 302. And it vests in the courts all the judicial power of the state. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them. And admission to the bar appears to be a judicial power. It may therefore become a very grave question for adjudication here, whether the constitution does not entrust the rule of admis-

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

sions to the bar, as well as of expulsion from it, exclusively to the discretion of the courts.

The legislature has, indeed, from time to time, assumed power to prescribe rules for the admission of attorneys to practice. When these have seemed reasonable and just, it has generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a coördinate branch of the government, without considering the question of power. We do not understand that the circuit courts generally yielded to the unwise and unseemly act of 1849, which assumed to force upon the courts as attorneys, any persons of good moral character, however unlearned or even illiterate; however disqualified, by nature, education or habit, for the important trusts of the profession. We learn from the clerk of this court that no application under that statute was ever made here. The good sense of the legislature has long since led to its repeal. And we have too much reliance on the judgment of the legislature to apprehend another such attempt to degrade the courts. The state suffers essentially by every such assault of one branch of the government upon another; and it is the duty of all the coördinate branches scrupulously to avoid even all seeming of such. If, unfortunately, such an attack upon the dignity of the courts should again be made, it will be time for them to inquire whether the rule of admission be within the legislative or the judicial power. But we will not anticipate such an unwise and unbecoming interference in what so peculiarly concerns the courts, whether the power to make it exists or not. In the meantime, it is a pleasure to defer to all reasonable statutes on the subject. And we will decide this motion on the present statutes, without passing on their binding force.

This is the first application for admission of a female to the bar of this court. And it is just matter for congratulation that it is made in favor of a lady whose character raises no personal objection: something perhaps not always to be looked for

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

in women who forsake the ways of their sex for the ways of ours.

The statute provides for admission of attorneys in a circuit court upon examination to the satisfaction of the judge, and for the right of persons so admitted to practice in all courts here except this; but that to entitle any one to practice in this court he shall be licensed by order of this court. *Tay. Stats.*, ch. 119, §§ 31, 32, 33. While these sections give a rule to the circuit courts, they avoid giving any to this court, leaving admission here, as it ought to be, in the discretion of the court. This is, perhaps, a sufficient answer to the present application, which is not addressed to our discretion, but proceeds on assumed right founded on admission in a circuit court. But the novel positions on which the motion was pressed appear to call for a broader answer.

The language of the statute, of itself, confessedly applies to males only. But it is insisted that the rule of construction found in subd. 2, sec. 1, ch. 5, R. S., necessarily extends the terms of the statute to females. The rule is that words in the singular number may be construed plural, and in the plural, singular; and that words of the masculine gender may be applied to females; unless, in either case, such construction would be inconsistent with the manifest intention of the legislature.

This was pressed upon us, as if it were a new rule of construction, of peculiar application to our statutes. We do not so understand it. It appears to be but a particular application of the general rule thus stated by *TINDALL, C. J.*: "The only rule for the construction of acts of parliament is, that they should be construed according to the intent of the parliament which passed the act." And it is not new or peculiar here. *Potter's Dwarrris*, 111. The last clause of the rule, relating to sex, seems to be almost as old as *Magna Charta*. *Coke*, 2 *Inst.*, 45. We apprehend that, unless in the construction of penal statutes, it has been little questioned since the

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

much considered case of *King v. Wiseman*, Fortescue, 91. The rule is permissive only, as an aid in giving effect to the true intent of the legislature. Even of a statutory rule positive in terms, Lord DENMAN said: "It is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be included within a term, when the circumstances require that they should." *Queen v. Justices, etc.*, 7 A. & E., 480. So, *a fortiori*, of the permissive rule here.

And the argument for this motion is simply this: that the application of this permissive rule of construction to a provision applicable in terms to males only, has effect, without other sign of legislative intent, to admit females to the bar from which the common law has excluded them ever since courts have administered the common law. This is sufficiently startling. But the argument cannot stop there. Its logic goes far beyond the bar. The same peremptory rule of construction would reach all or nearly all the functions of the state government, would obliterate almost all distinction of sex in our statutory *corpus juris*, and make females eligible to almost all offices under our statutes, municipal and state, executive, legislative and judicial, except so far as the constitution may interpose a virile qualification. Indeed the argument appears to overrule even this exception. For we were referred to a case in Iowa, which unfortunately we do not find in the reports of that state, holding a woman not excluded by the statutory description of "any white male person." If we should follow that authority in ignoring the distinction of sex, we do not perceive why it should not emasculate the constitution itself and include females in the constitutional right of male suffrage and male qualification. Such a rule would be one of judicial revolution, not of judicial construction. There is nor sign nor symptom in our statute law of any legislative imagination of such a radical change in the economy of the

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

state government. There are many the other way; an irresistible presumption that the legislature never contemplated such confusion of functions between the sexes. The application of the permissive rule of construction here would not be in aid of the legislative intention, but in open defiance of it. We cannot stultify the court by holding that the legislature intended to bring about, *per ambages*, a sweeping revolution of social order, by adopting a very innocent rule of statutory construction.

Some attempt was made to give plausibility to the particular construction urged upon us, founded on ch. 117 of 1867, and ch. 79 of 1870. It was represented that the former admits women to every department of the university, excepting the military only, and so necessarily including the law department; that the latter directs admission to the bar of the graduates of the law department; that the legislature had thus provided for the admission of female graduates of the law school, and ought therefore to be understood as intending the admission of women under the general statute. If the legislature had so provided for the admission of female graduates, we do not perceive how that could aid the construction of the general statute, or this lady, who does not appear to be a graduate. But, unfortunately for the position, the statutes were not stated with the fair accuracy which becomes counsel, and do not support it.

The act of 1867 is an amendment of sec. 4 of the act of 1866, reorganizing the university. The section of 1866 provided, without qualification, that "the university in all its departments and colleges shall be open alike to male and female students." The section of 1867 substitutes the provision, that "the university shall be open to female as well as male students, under such regulations and restrictions as the board of regents may deem proper." In both statutes, the section provides that all able bodied male students shall receive military instruction, and makes no other reference to a

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

military department. And the argument that the admission of females under the statute of 1867, to all departments except the military, necessarily contemplated their admission to the law department, falls to the ground, because the statute neither mentions all departments nor excepts the military — if there be a military — department.

The inaccuracy is the more striking from the fact that the section of 1866 does expressly include all departments and colleges, and the amendment of 1867, evidently *ex industria*, omits them. The change of an absolute right of admission to all departments and colleges of the university in 1866, to admission to the university under discretionary regulations and restrictions of the regents in 1867, is very significant; the more so that it is the only amendment made. It seems likely that the legislature came to regard the absolute and indiscriminate right of 1866 as dangerously broad, and to consider it necessary to make the right subordinate to the judgment of the regents. And if the law school had then been established by statute, it would be very doubtful whether the admission of females to it would be sanctioned by the act of 1867. But there was no such statute; and the law school was in fact established, not by statute, but, as we learn, by the authorities of the university, some time in 1868, after the enactment of the section in both forms. The first class of students, all males, graduated in 1869, without color of right to practice. Hence the statute of 1870, to give the right, presumably passed without thought of the admission of females to the bar. And the general argument for this motion takes nothing by these statutes.

So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

the well being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene, in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society, with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written, *le commencement de la vie est sans secours, le milieu sans plaisir, et le fin sans consolation*, voluntarily to commit it to such studies and such occupations. *Non tali auxilio nec defensoribus istis*, should juridical contests be upheld. Reverence for all womanhood would suffer in the public spectacle of woman so instructed and so engaged. This motion gives appropriate evidence of this truth. No modest woman could read without pain and self abasement, no woman could so overcome the instincts of sex as publicly to discuss, the case which we had occasion to cite *supra*, *King v. Wiseman*. And when counsel was arguing for this lady that the word, person, in sec. 32, ch. 119, necessarily includes females, her presence made it impossible to suggest to him as *reductio ad absurdum* of his position, that the same construction of the same word in sec. 1, ch. 37, would subject woman to prosecution for the paternity of a bastard, and in secs. 39, 40, ch. 164, to prosecution for rape. Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety. If, as counsel threatened, these things are to come, we will take no voluntary part in bringing them about.

By the Court.—The motion is denied.

Merrill and others vs. Nightingale and others.

MERRILL and others vs. NIGHTINGALE and others.

CONTRACT: GOODS MADE TO ORDER. (1) *Breach of warranty: Rights of purchaser.*

EVIDENCE. (2) *When maker, in action for contract price, may prove actual value.* (3) *Order of proof under control of trial court.* (4) *Rebutting evidence as to breach of warranty.*

REVERSAL OF JUDGMENT. (3) *No fatal error where appellant not injured.* (5) *When verdict will not be disturbed.*

1. Where machinery, made to order, fails to answer the purpose for which the maker knew it was ordered, or fails to perform as warranted, the purchaser may relieve himself from liability to pay for it, by returning or offering to return it within a reasonable time; or may retain it, and, in an action for the contract price, recoup his damages for breach of the contract of warranty, including the difference between the actual value of the machinery and what its value would have been, had it been as warranted.
2. Where the purchaser of such machinery seeks, in an action for the contract price, to recoup damages for breach of warranty, the plaintiff may introduce proof of the actual value of the machinery, independently of the contract.
3. The order of proof is very much under the control of the trial court; and where the plaintiffs' proof of the actual value of the machinery, in such a case, was received before defendants had given evidence of their damages: *Held*, that the judgment will not be reversed for that reason, it not appearing that defendants could be injured by the practice adopted.
4. The machinery in question being designed for the manufacture of a certain kind of paper, and defendants having testified that, upon their testing it, such paper could not be manufactured with it, plaintiffs were entitled to show, in rebuttal, that the tests made were not fair or conclusive, because of the unfitness of the water used, or for any other reason.
5. Where, upon an admissible theory of the case, the verdict is supported by the evidence, it will not be disturbed.

APPEAL from the Circuit Court for *Outagamie* County.

It appears from the pleadings and evidence that the plaintiffs agreed to manufacture for, and put up for use in the mill of the defendants, certain paper-mill machinery, for the manufacture of straw board paper, for which the defendant agreed

Merrill and others vs. Nightingale and others.

to pay \$19,250, and that they paid on the contract about \$15,000. This action is for the unpaid balance of such contract price.

The plaintiffs gave testimony on the trial tending to prove performance by them of the agreement.

The defendants aver in their answer, and introduced testimony on the trial tending to show, that the plaintiffs agreed to furnish such machinery ready for use by a day certain; and that when so furnished, a specific kind of straw board paper, known as No. 40, could be manufactured with it; but that the machinery was not furnished until three months after the agreed time, and that when furnished No. 40 straw board paper could not be manufactured with it. The answer contains counterclaims for damages for the alleged failure of the plaintiffs to perform their contract as respects both the capacity of the machinery and time.

In their reply to such counterclaims, the plaintiffs deny that they agreed to furnish the machinery by a day certain, or that the specified kind of paper could be manufactured therewith; and they introduced testimony tending to prove such denials. They admit, however, that the machinery was furnished for the manufacture of straw board paper, but of much higher numbers.

Defendants introduced testimony tending to show that they were unable to manufacture straw board paper of any number with the machinery furnished by the plaintiffs; and one of them testified, on cross examination, that the fault was not in the water used in the attempted process. The plaintiffs were permitted, under objection, to give testimony to the effect that the water so used was filthy and entirely unfit to be used in such process; and also to give testimony of the value of the machinery, irrespective of the contract of sale.

The evidence of the defendants tends to show that they used the machinery for making wrapping paper, which was less profitable than straw board, and that subsequently they

changed the machinery so that they could manufacture straw board. They retain and use the machinery.

The instructions given to the jury cover the whole case, and were not excepted to by the defendants. The jury found for the plaintiffs, and assessed their damages at \$3,280. Under the charge of the court, it may be assumed that this is the amount of the principal sum found due the plaintiffs and interest thereon for something more than a year; and a computation shows that the jury must have allowed the defendants between \$1,300 and \$1,500 on one or more of their counter-claims, but on which of them does not appear.

A new trial was denied, and judgment was rendered pursuant to the verdict. The defendants appealed from the judgment, assigning the following errors: "1. The court erred in admitting evidence of the value of the machinery, irrespective of the contract of sale. 2. The court erred in admitting proof that the quality of water used in testing the machinery destroyed its effectiveness for the purpose sold. 3. There is no evidence to support the verdict under the instructions of the court."

E. S. Bragg, for appellants:

1. It is undisputed that the price for which the machinery was sold was fixed by the terms of sale. It was immaterial, therefore, for the plaintiffs to show what the goods were in fact worth, and it cannot be known that defendants were not injured by the improper admission of such proof. 2. It was error to admit testimony that no paper could be made with the kind of water used by defendants. This was an entirely new issue, not in the pleadings, and inconsistent with them. 3. Counsel argued from the evidence that the verdict could not stand; that it was either not nearly large enough, or altogether too large.

David Taylor, for respondents, contended that there was abundant evidence to support the verdict; that the *quantum* of damages was to be fixed by the jury, and that, as it cannot

Merrill and others vs. Nightingale and others.

be said that the amount fixed was so clearly wrong as to render it evident that they made a gross mistake or were actuated by corrupt motives, the verdict must stand. *McDonald v. Walter*, 40 N. Y., 551; *Richards v. Sandford*, 2 E. D. Smith, 349; *Armstrong v. Haley*, 4 Q. B., 917; *Collins v. Albany R. Co.*, 12 Barb., 492; 3 Wait's Pr., 413; *Apps v. Day*, 14 C. B., 112; *Bradlaugh v. Edwards*, 11 C. B., N. S., 377. The court should give such construction to the evidence as will support the verdict. *König v. Katz*, 37 Wis., 153. Counsel also argued from the record that the jury must have found that there was no breach of warranty, and therefore the admission of evidence merely tending to show the *quantum* of damages in case a breach were found, was harmless; that there was no issue as to the capacity of the machinery to make straw board paper No. 40, because plaintiffs admitted that such paper could not be made with it, merely denying any such warranty; and that if there had been any issue as to its capacity to make the higher numbers (as from 80 to 120), the evidence introduced by plaintiffs as to the quality of the water used by defendants would have been competent and material.

LYON, J. I. If, after a fair trial thereof, the machinery failed to answer the purposes for which the plaintiffs knew it was ordered, or failed to perform as warranted by the plaintiffs, the defendants might have relieved themselves from all liability to pay therefor by refusing to retain it, and by returning or offering to return the same to the plaintiffs within a reasonable time after it was put up in their mill. *Woodle v. Whitney*, 23 Wis., 55. The defendants did not elect to take this course, but retained the machinery, and seek, in this action for the unpaid balance of the price thereof, to recoup their damages for the alleged breach of the contract of warranty. This they may lawfully do; and the measure of their damages for such breach, or, at least, a portion of their damage therefor, is the difference between the actual value of the

Merrill and others vs. Nightingale and others.

machinery and what its value would have been had it been as warranted. *Boothby v. Scales*, 27 Wis., 626, and cases cited. *Giffert v. West*, 33 id., 617; *Bonnell v. Jacobs*, 36 id., 59.

The defendants introduced evidence of the damages suffered by them by reason of the alleged breach of warranty; and certainly it was competent for the plaintiffs to give testimony on the same subject. In view of the rule of damages above stated, proof of the actual value of the machinery was competent. Indeed, in the absence of such proof, the damages which the defendants seek to recoup cannot be ascertained. The actual value of the machinery is put in issue by the pleadings, and it cannot be error to admit evidence thereof.

The only plausible ground of objection to the testimony under consideration is, we think, that it was received before the defendants had given any proof of their damages. The order of proof is very much under the control of the trial court; but if the practice here adopted was irregular, it is not perceived how the irregularity could possibly result in harm to the defendants.

II. It is a verity in the case that the machinery was furnished for the purposes of the manufacture of straw board paper, the controversy being as to the numbers or kinds of such paper to be manufactured therewith. There was at least an implied warranty that the machinery was sufficient for the purposes for which it was furnished. The defendants gave testimony on the trial tending to show that the machinery was fully tested, and that neither No. 40 nor any other number or kind of straw board paper could be manufactured with it. Clearly it was competent for the plaintiffs to rebut the defendant's proofs by showing that, because of the unfitness of the water used in testing the machinery, or for any other reason, the tests were not fair or conclusive of the capacity of the machinery.

III. It is claimed that there is not sufficient evidence to support the verdict; that in any reasonable view of the testi-

Pierce and others vs. Covert, implicated.

mony, the verdict is entirely too large or too small. We do not think so. The damages for the causes alleged in the counterclaims were unliquidated, and the testimony tending to show the extent or amount thereof is not positive or certain. In assessing those damages the jury had something more to do than merely to make a computation. They were required to determine the weight of testimony, the correctness of opinions and estimates, and, generally, to make such assessment from uncertain, and, in some respects, unsatisfactory data. Unless it can be shown that there is no admissible theory of the case which will support the verdict, it should not be disturbed. Without entering into detail, we think the verdict can be sustained on the hypothesis (which is justified by the testimony), that there was no breach of warranty, but that the plaintiffs failed to furnish the machinery at the agreed time.

For that failure an award of between \$1,300 and \$1,500 damages is neither so large nor so small that the court can interfere with it, having due regard to the testimony on the subject.

Finding no error in the case of which the defendants can justly complain, we must affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

PIERCE and others vs. COVERT, imp.

PARTNERSHIP: DISSOLUTION: REAL ESTATE. *How real property to be disposed of on decreeing a dissolution, where title was taken by the partners in their individual names, and the undivided share of one conveyed to a stranger; there being other assets sufficient.*

1. As a general rule, so far as the partners and creditors of a firm are concerned, real estate of the partnership is in equity deemed mere person-

Pierce and others vs. Covert, impleaded.

- alty; and in case of a dissolution, it is often decreed to be sold, as a proper method of ascertaining its value and making an equal distribution of the partnership effects.
2. But where partners have taken title to real estate as tenants in common, and all debts due to third persons and between themselves have been discharged, and an equal distribution of the assets can be made without a sale of the real estate, such a sale need not be ordered on a dissolution, unless it appears that such an order would be most beneficial to the partners.
 3. In this action for the dissolution of a partnership, it appeared that the assets in money, notes and accounts were much more than sufficient to pay all debts, and that title to real estate of the firm had been taken by the partners in their individual names as tenants in common; that one of the partners was dead, and his personal representatives, heirs and widow are made parties to the action; and that another of the partners had conveyed his undivided third of the real property, to one G. C., not a member of the firm, who is made defendant. The complaint alleges that the real estate cannot be divided without great prejudice to the owners, but there is no pretense that a sale is necessary for an equal distribution of the assets. *Held*, that the court erred in ordering G. C. to convey his undivided one-third of the real property to the receiver appointed in the action.
 4. An action for the dissolution of a partnership and a settlement of its affairs should not be complicated by proceedings therein for the partition of real property.

APPEAL from the Circuit Court for *Rock* County.

The complaint in this action asked for a dissolution of a copartnership (between the defendant Augustus Covert, and the plaintiffs or those whom they represent), the appointment of a receiver, and the division and settlement of the partnership property. The defendant *George Covert* made no answer to the complaint, but filed an affidavit setting forth, in substance, that before the commencement of the action he had purchased of the defendant Augustus Covert his undivided one-third interest in the real estate named in the complaint, making such purchase in good faith, and with no intent to defraud, and that it would cause him great injury to compel him to convey the property to a receiver. Subsequently an order was made by the court requiring *George*

Pierce and others vs. Covert, impleaded.

Covert to show cause why he should not convey said real estate to the receiver who had been appointed. On the hearing of this order, he filed another affidavit, alleging the same facts, and also that he believed the plaintiffs were endeavoring indirectly to obtain for their own benefit and for less than it was worth, the interest owned by him; and further, that the firm composing the copartnership were solvent and out of debt, and had a large amount of money on hand. The court ordered said defendant to convey to the receiver the property in controversy, and that the same be sold at public auction according to the practice of the court. From this order *George Covert* appealed.

The evidence is sufficiently stated in the opinion.

The cause was submitted by both sides on briefs.

Bennett & Sale, for appellant:

1. The real estate in question, having been purchased by the partners with partnership funds and conveyed to them in such manner as to make them tenants in common (*Tay. Stats.*, 1127, §§ 44, 45), must be considered at law as their *several property*, though it may be subject to a trust by which it is liable to be applied *if necessary* to the payment of the partnership debts. *Peck v. Fisher*, 7 Cush., 386; *Bird v. Morrison*, 12 Wis., 138. In this case the proof was clear that there were no firm debts. 2. There was no evidence that the appellant knew that the land had been purchased with partnership property; and he was a *bona fide* purchaser. *Shufeldt v. Pease*, 16 Wis., 659; *Hiscock v. Phelps*, 49 N. Y., 103; *Buchon v. Sumner*, 2 Barb. Ch., 165. 3. The action cannot be turned into one of partition. A complaint for an accounting, as in this case, and for a partition of real estate, would be multifarious. *Ketchum v. Durkee*, 1 Barb. Ch., 480; *Buckley v. Buckley*, 11 Barb., 43; *Coles v. Coles*, 15 Johns., 159; *Balmain v. Shore*, 9 Ves. Jr., 500; *Thornton v. Dixon*, 3 Brown C. C., 199.

Cassoday & Carpenter, for respondent:

Pierce and others vs. Covert, impleaded.

1. It cannot be claimed that *George Covert* is a *bona fide* purchaser without notice, from Augustus Covert. From his relationship to the parties, and the knowledge which he was shown to have of their transactions, he will be *presumed* to have had notice. *Tillinghast v. Champlin*, 4 R. I., 173; *Wicke v. Lake*, 21 Wis., 412-413; *Warner v. Fountain*, 28 id., 405; *Wickes v. Lake*, 25 id., 71; *Cavender v. Bultul*, 29 L. T. R. (N. S.), 710. He has put in no answer, and made no proof that he was a *bona fide* purchaser. *Boone v. Chiles*, 10 Peters, 211-212; *Thomas v. Stone*, Walker's Ch. (Mich.), 117; *Warner v. Whitaker*, 6 Mich., 133. Even where a person is a *bona fide* purchaser without notice, courts of equity will control and dispose of so much of the purchase money as remains unpaid. *Wynn v. Carter*, 20 Wis., 107, and cases last above cited. Real estate bought with partnership funds and used in partnership business will be treated in equity as partnership property, and is liable to be administered as such in winding up the affairs of the firm. *Phillips v. Phillips*, 1 Mylne & K., 649, 663; *Broom v. Broom*, 3 id., 443; *Houghton v. Houghton*, 11 Sim., 491; *Mauck v. Mauck*, 54 Ill., 281; *Moran v. Palmer*, 13 Mich., 367, 377; *Collumb v. Read*, 24 N. Y., 509, 510; *Meily v. Wood*, 71 Pa. St., 488; *Fowler v. Bailey*, 14 Wis., 125; *Dyer v. Clark*, 5 Met., 562; *Howard v. Priest*, 5 id., 582. The later English cases even hold that real estate belonging to the firm is in equity absolutely converted into *personalty* for all purposes. *Darby v. Darby*, 3 Drewry, 505; *Essex v. Essex*, 20 Beav., 442; *Morris v. Kearsley*, 2 Young & Coll., Ex., 139; *Cornwall v. Cornwall*, 6 Bush (Ky.), 372; *Bank of Louisville v. Hall*, 8 id., 678; *Pierce v. Trigg*, 10 Leigh, 406. 2. The rule is that all the partnership property be converted into cash by a sale, and the proceeds thereof, after the payment of the partnership debts, be divided. This is especially true as to real estate which is so situated that it cannot be divided, nor used in severalty. 2 Van Santv. Eq. Pr., 201; Story on Part., 207-350;

Pierce and others vs. Covert, impleaded.

Darby v. Darby, supra. 3. All persons who have an interest in having the firm control the assets, must be made parties. *Webb v. Helian*, 3 Rob. (N. Y.), 625; *Hayes v. Hayes*, 4 Sandf. Ch., 485; 2 Van Santv. Eq. Pr., 186; *Walkenshaw v. Perzel*, 32 How. Pr., 233. This being so, the rights of *George Covert* must be determined in this suit. 4. Where partners disagree, it is almost a matter of course to appoint a receiver. 1 Van Santv. Eq. Pr., 392; *Jackson v. De Forest*, 14 How. Pr., 81. The same rule prevails between the representatives of the deceased partner and the surviving partner. 1 Van Santv. Eq. Pr., 393; Collyer on Part., § 135; Edwards on Receivers, 309-329. A receiver will be appointed of real estate held in severalty, if treated as partnership property, and he may obtain possession by suit. Edwards, 336; *Smith v. Danvers*, 5 Sandf. S. C., 669; 2 Van Santv. Eq. Pr., 217, 218; 1 id., 459, 460. 5. The property should be applied upon Augustus Covert's indebtedness to the firm, in preference to his indebtedness to his brother *George Covert*. *Jackson v. Cornell*, 1 Sandf. Ch., 348; *Wilson v. Robertson*, 21 N. Y., 587. And the cases cited by appellant's counsel do not establish a different rule. 6. The court has jurisdiction of the action and the parties, and may retain such jurisdiction for the purpose of making a partition. Courts of equity have assumed a general concurrent jurisdiction with courts of law in cases of partition. 1 Story's Eq. Jur., §§ 646-658; *Deery v. McClintock*, 31 Wis., 195. Such jurisdiction existed prior to the statute, and the statute merely cumulates the remedy. *Patton v. Wagner*, 19 Ark., 233; *Spitts v. Wells*, 18 Mo., 471; *Whitten v. Whitten*, 36 N. H., 332; *Wright v. Marsh*, 2 G. Greene (Iowa), 94. 7. The complaint contains all that is required by our statutes, and all necessary persons are made parties. R. S., ch. 142, secs. 1, 2, 5, 22, 33, 59 and 60. It is in the discretion of the court whether sufficient proofs have been made, and whether the case is a proper one to allow partition or sale. *Howell v. Mills*, 56 N. Y., 226; *Wright v.*

Pierce and others vs. Covert, impleaded.

Marsh, supra. 8. The objection that several causes of action were improperly united, could only be taken by demurrer or answer. Secs. 5 and 9, ch. 125, R. S. Moreover it is a well established rule, that when a court of equity has taken jurisdiction for one purpose it will retain it and do complete justice between all the parties. 1 Story's Eq. Jur., § 64; *Rathbone v. Warren*, 10 Johns., 595; *King v. Baldwin*, 17 id., 388; *Prescott v. Everts*, 4 Wis., 319; *Hamilton v. Fond du Lac*, 25 id., 490; *Akerly v. Vilas*, 15 id., 401; *Phillips v. Gorham*, 17 N. Y., 274; *N. Y. Ins. Co. v. N. W. Ins. Co.*, 23 id., 359, 360.

COLE, J. It seems to us it would have been much better practice for the defendant *George Covert* to have answered the amended complaint, showing all the facts in regard to his purchase of the warehouse property as he has set them forth in his affidavits. He states in the first affidavit filed with the commissioner, that he was advised by his counsel that it was unnecessary for him to answer, and consequently he did not do so. But we think it would have been more regular and formal for him to have answered, instead of setting up his interest in the real estate by way of affidavit, as he did on the rule to show cause. No objection is taken to the informal way in which his rights or interests in the property are presented to the court; and they will therefore be considered as the record now stands.

The main facts of the case are undisputed. The action is for a dissolution of a partnership, and for a settlement and division of the property among those entitled to it. A receiver has been appointed to take charge of the property of the firm and to collect the debts. The firm was originally composed of Griswold Weaver, Henry Pierce and Augustus Covert; was formed in August, 1866, for the purpose of buying and selling live stock, grain and produce at Clinton, Rock county, under articles by which each partner agreed to furnish an

VOL. XXXIX. — 17

Pierce and others vs. Covert, impleaded.

equal amount of capital stock and was equally interested in the profits and losses. The firm purchased real estate with partnership funds, and erected a warehouse thereon for the purpose of carrying on their business. The title was conveyed to the partners in their individual names; and they apparently and in fact held it as tenants in common. Weaver died in December, 1872, and his personal representatives, heirs and widow are made parties to this action. It abundantly appears that the firm is perfectly solvent; that it owes no debts; and that there will be assets of considerable amount to be divided among the partners, after paying all debts and the costs and expenses of this action. The defendant *George Covert* purchased in June, 1873, of Augustus Covert, the undivided third of the warehouse property, and took a conveyance thereof. This interest the circuit court ordered him to convey to the receiver, in order that it might be sold with other partnership property.

It is insisted and claimed by the counsel of *George Covert*, that this order was erroneous; that no good reason was shown for disturbing his title, or for compelling him to convey the interest which he has purchased and paid for, to the receiver. One partner, it is said, may sell and convey his interest in real estate owned and held by him with the other members of the firm as tenants in common, when the firm is out of debt and has money and personal property on hand, and when the partner selling his interest would owe the other partners nothing on a final settlement of the partnership account. But on the other hand it is claimed that where real estate is purchased with partnership funds for partnership use, it is treated in all cases in equity as personal property, not only for the purpose of paying the debts of the firm and adjusting the equities of the partners as between themselves, but also for the purpose of distributing the proceeds among those entitled to them.

The general rule doubtless is, that so far as the partners

Pierce and others vs. Covert, impleaded.

and the creditors are concerned, real estate belonging to the partnership is in equity deemed as mere personalty; and in case of dissolution it is often decreed to be sold as a proper way to ascertain its value, and in order that an equal distribution of the partnership effects may be made. But we do not understand the rule to be inflexible, that a court of equity always decrees the sale of real estate purchased with partnership funds for partnership purposes, on winding up the concern. The circumstances of some cases may be such as to render this entirely unnecessary. For example, where, as in this case, the partners have taken the title as tenants in common, and their interests in the real estate are precisely ascertained; where all the debts and obligations due to third persons and as between themselves have been paid and discharged; and where an equal distribution of the assets can be made without a sale of the real estate, — there it is not obvious why the court should order a sale on a dissolution of the partnership. True, it is said in some of the books that it is the right of any partner to insist on a sale of all the property on a dissolution; and this is ordinarily the course where it appears that it would be most beneficial for the interests of all the partners to do so. But we see no valid reason for adopting that course here. The complaint clearly treats the warehouse property as real estate held by the partners as tenants in common, and descending to the heirs of the deceased partner, subject to the wife's dower. It avers that the firm owed debts to only a small amount, and that there was property of \$2,000 and upwards, consisting of money, notes and accounts belonging to the firm. True, there is an allegation that the real estate cannot be divided without great prejudice and injury to the owners thereof; but there is no pretense that the sale is necessary in order to make an equal distribution of the assets. And after treating the real estate standing in the name of the individual partners as subject to all the rules and incidents which govern such property and descending to heirs, it would

Winslow and others vs. Urquhart.

seem that the case presented no ground for interfering with or disturbing the title. The complaint clearly shows that the partner *Pierce*, as well as the heirs and representatives of the deceased partner, treat the warehouse property as not governed by the principles applicable to partnership property; so that, whatever might otherwise be the rule, there is surely no necessity for decreeing its sale as such in this action.

But it is suggested on the brief of counsel for the plaintiffs, that as the court has taken jurisdiction of the cause for the dissolution of the partnership and winding up its concerns, it should retain the cause for the purpose of making a partition of the real estate. It seems to us that such a practice would be anomalous. To attempt to convert the proceeding into one for the partition of real estate, would only serve to complicate the matter, and delay the final settlement of the partnership account.

By the Court.— The order of the circuit court requiring the defendants *George Covert* and *Jennette Covert* to convey the undivided one-third of the warehouse property to the receiver, is reversed, and the cause is remanded for further proceedings according to law.

WINSLOW and others vs. URQUHART.

STATUTORY LIEN: LABOR UPON LOGS. (1) *Statutes valid. General owner not necessary party.* (2) *Rights of general owner; may replevy; not estopped by lien judgment.* (3) *When justice's judgment for a lien presumed valid.* (4) *One who cooks food for the loggers, etc., entitled to lien.* (5, 6) *Form of affidavit for attachment in such cases.*

PRACTICE. (7) *New trial in replevin, after judgment reversed.*

1. The statutes of 1860, 1862 and 1869, relating to liens upon logs for labor or services connected therewith, are valid; and where the laborer is not employed by the general owner of the logs, or of the land on which they are

Winslow and others vs. Urquhart.

- cut, but by a contractor under him, proceedings to enforce the lien are not invalid because such general owner is not made a party. *Munger v. Lenroot*, 32 Wis., 541, adhered to.
2. A judgment for the plaintiff in such an action does not estop the general owner of the logs from denying the right of such plaintiff to a lien upon them, in replevin by such owner against the purchaser under the judgment.
 3. In replevin for logs, where defendant claims under a judgment of a justice's court to enforce an alleged lien on the logs, which is regular on its face, such judgment must be held valid, unless the contrary affirmatively appears; and all reasonable presumptions consistent with the record will be made, to sustain it.
 4. The statute (Tay. Stats., 1768, § 25) gives to any person "that shall furnish any supplies, or that may do or perform any labor or services in cutting, falling, hauling, driving, running, rafting, booming, cribbing, or towing any logs or timber," a lien on them "for the amount due for such supplies, labor or services." *Held*, that these terms include an amount due under contract for cooking food for the men engaged in driving the logs.
 5. The *affidavit* for an attachment in this case, after stating the sum due plaintiff from defendant above all legal setoffs, adds, "that said indebtedness is due for labor and services performed by plaintiff for the defendant in and about cooking for men driving pine logs," etc., and does not otherwise show that it was "due upon contract, express or implied." *Held*, sufficient under Tay. Stats., 1769-70, §§ 28, 33. *Blackwood v. Jones*, 27 Wis., 498, distinguished.
 6. The affidavit for the attachment (under the act of 1862, as amended) showing that the petition for a lien upon the logs in dispute was duly filed in the office of the clerk of the circuit court of the proper county (viz., that in which the services were rendered, and in which the logs remained until seized on the attachment), it is not necessary to state that it was recorded in the office of the lumber inspector for the proper district; and it seems that such recording is not essential to the validity of the lien.
 7. On reversing a judgment in replevin for the plaintiff, the value of the property not having been determined on the trial, and not being ascertainable from the record here, the cause is remanded for a new trial.

APPEAL from the Circuit Court for Oconto County.

Replevin, for a quantity of pine saw logs; complaint in the usual form. The defendant in his answer claims to be the owner and entitled to the possession of such logs, by virtue of a sale thereof to him by the sheriff of Oconto county, on an

Winslow and others vs. Urquhart.

execution, as hereinafter stated. Such proceedings were had under ch. 128, R. S., that the logs were delivered to the plaintiffs. The action was tried by the court without a jury, and the only evidence introduced by either party was an agreed statement of facts, in effect as follows:

On July 8th, 1872, and prior thereto, the plaintiffs were the owners and in possession of the logs in controversy. On that day one Brooks commenced an action before a justice of the peace against one McCaulley, by attachment, under ch. 154, Laws of 1862 (entitled "An act providing for a lien for labor and service upon logs and lumber in certain counties"), and the acts amendatory thereof (Tay. Stats., 1768); and the logs were seized by virtue of the attachment issued in that action.

The statute (Tay. Stats., 1769, § 28) requires an affidavit to be made and annexed to the attachment before execution of the writ. In the case just mentioned, the affidavit was as follows: "Watson Brooks, being duly sworn, on oath says, that he is the above plaintiff; that the above defendant is indebted to the plaintiff in a sum over \$5.00, and in the sum of \$90, over and above all setoffs; *that said indebtedness is due for labor and services done and performed by the plaintiff for the defendant, in and about cooking for men driving pine logs in Oconto county, Wisconsin*, between the 9th day of April, 1872, and the 24th day of May, 1872; and that said logs are now lying in the waters of the Oconto river and Peshigo brook, *in Oconto county, Wisconsin*, and are marked as follows [here follows description of logs]; and that the plaintiff, on the 19th day of June, 1872, duly filed his statement, or petition under oath, for a lien on said logs, in the office of the clerk of the circuit court for the county of Oconto, Wis."

The complaint in the attachment suit alleges that Brooks, the plaintiff therein, performed labor for McCaulley, under a contract therein stated, from April 9th to May 24th, 1872, in the county of Oconto, "in and about cooking for men driving pine logs in Oconto county, Wis.;" that \$90 of the agreed

Winalow and others vs. Urquhart.

wages remain unpaid; "that said logs whereon plaintiff performed the labor and services aforesaid are now in the waters of Oconto river and Peshtigo brook in Oconto county;" and that said Brooks "on the 19th day of June, 1872, duly filed his petition or statement for a lien on said logs in the office of the clerk of the circuit court for Oconto county, Wis."

McCauley answered, admitting that Brooks worked for him, cooking for his men, as stated in the complaint, and took issue only on the amount due and unpaid for such work, which he admitted to be \$48.65, for which sum he tendered Brooks a judgment.

On July 9th, 1872, the sheriff of Oconto county seized the logs in controversy in this action, by virtue of the writ of attachment issued in the action of *Brooks v. McCauley*. After trial, and on the 9th of July, the justice rendered judgment for Brooks, for \$82.86 and costs, and also found and adjudged that the labor for the price of which the judgment was rendered was performed on the logs mentioned in the complaint, and that the judgment was a lien thereon. The logs were duly sold by the sheriff on an execution issued upon such judgment, and the defendant in the present action was the purchaser at such sale.

It was further stipulated as follows: "That prior to the commencement of this action the plaintiffs demanded the logs in question; that the defendant only claims title and right of possession to the logs described in the complaint by virtue of the judgment in the case of *Brooks v. McCauley*, and the subsequent proceedings thereon; that the only relation McCauley held to the plaintiffs was that he had taken a contract of them to get out and drive the logs in the complaint mentioned, and was to receive an absolute amount therefor."

The court found the facts to be as stated in the agreed case, and rendered judgment "that the plaintiffs recover of the defendant the possession of the personal property de-

Winslow and others vs. Urquhart.

scribed in the complaint, and also that they recover six cents damages, together with the plaintiffs' costs and disbursements incurred in this action, taxed at \$28.63, amounting in all to the sum of \$28.69."

The defendant appealed from the judgment.

The cause was submitted by both sides on briefs.

Hastings & Greene, for appellant, argued, 1. That the constitutionality of ch. 154, Laws of 1862, was settled by the decision in *Munger v. Lenroot*, 32 Wis., 541. 2. That the plaintiff in the action of *Brooks v. McCaulley* was entitled to the lien there adjudged for his services as a cook for the men engaged in getting out and driving the logs (*Young v. French*, 35 Wis., 111; *Hill v. Newman*, 38 Pa. St., 151; *Tizzard v. Hughes*, 3 Phila., 261; *In re Hope Mining Co.*, 1 Sawyer, U. S., 710); and that it must be presumed in favor of the justice's judgment, that if a lien for services in cooking exists under *any* circumstances, the necessary circumstances were shown in that case. (Counsel argued at length that the rule established or intimated by the cases above cited is the just one.) 3. That the plaintiffs cannot attack the judicial sale made in that case on the ground that the facts did not authorize a lien. (1) The proceedings in such cases are *in rem* (*Munger v. Lenroot*, *supra*; Tay. Stats., 1771); the seizure of the logs is therefore notice to all the world. *Moore v. Spackman*, 12 S. & R., 287; *Green v. Van Buskirk*, 7 Wall., 139; *Ziegenhagan v. Doe*, 1 Ind., 174; *Williams v. Stewart*, 3 Wis., 773; 15 Ohio, 435. (2) The logs were attached in the lien proceedings July 9, 1872; were sold September 19, 1872, and plaintiffs did not commence this action until the 30th of the latter month. If they could not have appeared in justice's court in the action by Brooks, and contested the lien, they could have sued the officer and Brooks at any time between the seizure and the sale. Having remained silent for two months, are they not estopped from disputing the validity of the proceeding on the ground that the facts proven did not

Winslow and others vs. Urquhart.

constitute a lien? *Thompson v. Blanchard*, 4 Coms., 303; 27 Barb., 595.

W. H. Webster, for respondents:

1. In the action before the justice, the affidavit for the writ failed to state that the indebtedness therein mentioned was due upon contract. The writ was therefore void, and the justice had no jurisdiction to proceed *in rem*. *Blackwood v. Jones*, 27 Wis., 498. 2. The complaint in that action should have alleged the recording of the lien in the office of the lumber inspector of the proper district, or the filing of the lien with the proper sub-inspector. Sec. 16, ch. 154, Laws of 1862. It should also have shown affirmatively that the claimant's labor was performed in one of the counties in which the lien law applies (sec. 1, ch. 154, Laws of 1862); whereas it merely shows that the men for whom the cooking was done were at work in Oconto county, and does not show where the cooking itself was done. The rights of an absent third party being seriously involved, the lien claimant should be held to a strict compliance with the statute. The complaint is so defective that a judgment under it, so far as it operated upon the status of property, would be reversed by this court though every essential fact had been proven. *K—— v. H——*, 20 Wis., 239. 3. If the act be constitutional, it does not provide a lien in favor of one performing labor as a *cook*; and hence the legislature of 1874 amended the act so as to make it include such services. Ch. 267 of 1874. See the reasoning in *Munger v. Lenroot*, p. 546. 4. Plaintiff's title was not divested by the sale under the justice's judgment. If the justice had no jurisdiction, the sale conferred no title upon the purchaser. 2 How. (U. S.), 43; *Shelton v. Tiffin*, 6 id., 163; *Williamson v. Berry*, 8 id., 495; *Morris v. Hogle*, 37 Ill., 150; *Harshy v. Blackmarr*, 20 Iowa, 161. And even if the court had jurisdiction, if from any cause the sale was really void, the objection is good in a collateral proceeding. *Cooper v. Sunderland*, 3 Clarke (Iowa), 114; *Frazier v. Steenrod*, 7

Winslow and others vs. Urquhart.

Iowa, 346. But *Munger v. Lenroot* is decisive that plaintiffs are not estopped by the sale in question. See also *Hadson v. Tibbetts*, 16 Iowa, 97; *McGahan v. Carr*, 6 id., 331; *Brog-hill v. Lash*, 3 G. Greene, 357.

Hastings & Greene, in reply:

1. The affidavit for a lien is in the exact language of the statute under which such lien was claimed. Tay. Stats., 1768-70, §§ 25, 28, 33. 2. The lien is not required to be recorded in the lumber inspector's office. (1) The language of ch. 167 of 1864 as to such recording applies only to mortgages or other written instruments. (2) The law of 1864 in no way attempts to amend the lien law of 1862. The law of 1867 simply extends the provisions of the act of 1862, and *none other*, to Oconto county. 3. The allegation that plaintiff *duly* filed his petition or statement for a lien with the clerk of the circuit court for Oconto county, is sufficient. *Burdick v. Briggs*, 11 Wis., 126, 132. This allegation, not being denied *under oath* in the answer, is admitted. Tay. Stats., 1772, § 41. 4. The language of the law of 1862, and of sec. 1, ch. 267, Laws of 1874, so far as it prescribes what services shall constitute a lien, is identical. Subsequently said sec. 1 declares: "*The provisions of this section shall include the labor and services of any cook,*" etc. This is a legislative construction of the language preceding; and so far as the law of 1874 is entitled to any weight in this argument, it confirms our construction of the act of 1862. But the present case is governed by the principle that the legislature cannot declare the intent of a prior law so far as it applies to cases arising before the explanatory act. Opinion of DIXON, C. J., in *Munger v. Lenroot*, pp. 556-7, and cases there cited; *Cooley's Con. Lim.*, 92-94. *Young v. French*, 35 Wis., 111, was a judicial construction of the law of 1862.

LYON, J. We adhere to the decision of this court in *Munger v. Lenroot*, 32 Wis., 541, and must therefore hold that the statutes under which the lien proceedings were had were

Winslow and others vs. Urquhart.

valid laws, although they did not require that the plaintiffs, who were the general owners of the logs in controversy, should be made parties to such proceedings; and further, that such proceedings are not invalid merely because they were not made parties thereto. But, on the authority of the same case, the plaintiffs may, in this action, contest the right of Brooks, the plaintiff in those proceedings, to enforce a lien against the logs. This they have done. If they have shown that he was not entitled to such lien, the title to the logs claimed by the defendant solely under the execution sale necessarily fails, and the plaintiffs are entitled to judgment.

The question whether Brooks was entitled to a lien upon the logs is to be determined upon the record of the proceedings before the justice; for by that record only is the validity of the lien judgment attacked. It may here be observed that such judgment is *prima facie* regular and correct, and must be held a valid judgment unless it appears affirmatively that it is not. To uphold it resort will be had to all reasonable presumptions consistent with the record. This rule is elementary, and its application to the case will dispose of some of the objections to the validity of the lien judgment urged on behalf of the plaintiffs. Other objections to the validity of such judgment, not disposed of by the rule just stated, will now be considered.

1. The services for which the lien judgment was rendered consisted in cooking food for the men engaged in driving the logs in controversy; and it is earnestly contended by the learned counsel for the plaintiffs, that the statute under which the lien proceedings were instituted gives no lien for such services. The statute (Tay. Stats., 1768, § 25) gives to any person "that shall furnish any supplies, or that may do or perform any labor or services in cutting, falling, hauling, driving, running, rafting, booming, cribbing or towing any logs or timber," in certain counties therein named, including Oconto county, a lien on such logs or timber "for the amount

Winslow and others vs. Urquhart.

due for such supplies, labor or services." In *Young v. French*, 35 Wis., 111, the opinion is expressed that one who cooks for the men at work on the logs directly, is entitled to a lien thereon for his wages under the statute. We have reviewed the question, and think the opinion there expressed is correct. It seems to us that the person who cooks the food for the men who fall the trees and work directly and immediately upon the logs or timber, performs service in cutting, falling, driving, etc., such logs or timber, within the meaning of the statute, equally with those who use the axe, the saw or the team to the same end. These are all engaged in the business of manufacturing trees into logs and timber, and transporting the same from the forest to a market; and to accomplish the common purpose the labor of each in his department is necessary. Moreover, he who cooks the food "furnishes supplies," equally with the person who furnishes the raw materials. The acts of both are essential to the supplying of the men with food, and both "furnish supplies," within the meaning of the statute. Both also render "services on logs or timber," within the meaning of the averment to that effect required in the affidavit to be annexed to the attachment. Tay. Stats., 1769, § 28.

The statute under consideration was enacted in the interests of labor, and a sound public policy requires that it be liberally construed. The construction contended for on behalf of the plaintiffs is too narrow, and, if adopted, would go far to defeat the objects and purposes of the statute. We cannot adopt it, but must hold that the claim of Brooks in the attachment suit was within the statute.

2. The next objection to the validity of the lien judgment is, that the affidavit annexed to the writ of attachment is fatally defective in that it is not set forth that the indebtedness therein mentioned was due upon contract, express or implied, and *Blackwood v. Jones*, 27 Wis., 498, is cited to support the objection. It is sufficient to say that *Blackwood v. Jones*

was a case commenced by attachment in a justice's court under the general attachment law applicable to such courts (R. S., ch. 120, sec. 99), and has no application to the proceedings before us. The statement of indebtedness in the affidavit in these proceedings seems to be in strict compliance with the statute. Tay. Stats., 1769-70, §§ 28, 33. We think the objection is not well taken.

3. The only other objection to the validity of the lien judgment necessary to be considered is, that neither the affidavit annexed to the attachment, nor the complaint in the attachment suit, shows that the lien claimed was recorded in the office of the lumber inspector for the proper lumber district. It is claimed on behalf of the plaintiffs that such record is made essential to the validity of the lien by sec. 12, ch. 167, Laws of 1864 (Tay. Stats., 757, § 19).

The statute of 1862, as amended, under which the attachment suit was brought, requires that a petition or statement of the lien shall be filed in the office of the clerk of the circuit court for the proper county, by a time therein specified; that the affidavit annexed to the attachment shall state that the plaintiff has filed such petition or statement; and that the plaintiff shall allege the filing thereof in his complaint. Tay. Stats., 1769, 1772, §§ 27, 28, 41. Beyond all question, the "proper county" in which to file the petition or statement in *Brooks v. McCaulley*, was the county of Oconto; for the services were rendered by Brooks in that county, and the logs remained therein until seized on the attachment. The allegations of the filing of the petition or statement of lien required to be inserted in the affidavit and complaint, clearly relate to the *filing* thereof in the office of the clerk of the circuit court, and not to the *recording* thereof in the office of the lumber inspector. In the proceedings before us we find a substantial compliance with the statute.

It is proper to add that we do not understand that the recording of a petition or statement of the statutory lien for

Winslow and others vs. Urquhart.

supplies or for labor and services on logs or lumber, in the office of the lumber inspector, is essential to the validity of such lien.

We conclude that the plaintiff failed successfully to impeach the lien judgment, and hence, that the defendant obtained a good title to the logs in controversy by his purchase thereof at the execution sale, and should have had judgment for a return of the logs or the value thereof, in case a return could not be had.

The judgment must therefore be reversed; but we cannot direct the proper judgment to be entered for the defendant, because the value of the logs was not ascertained on the trial, and cannot be ascertained from the testimony. Another trial is necessary to supply such defects in the proofs.

By the Court. — Judgment reversed, and a *venire de novo* awarded.

CASES DETERMINED

AT THE

January Term, 1876.

CARPENTER VS. THE STATE.

CONSTITUTIONAL LAW. (1) *Query as to legislative power to submit claim against state to arbitration. (2, 3) Legislative provision for paying contractor with state a compensation determined outside of his contract, invalid.*

1. Whether ch. 323 of 1874 was designed to submit the plaintiff's claim against the state to arbitration, and make the report of the commissioners there named binding upon the state as an award, and whether the legislature has power to make such a submission, *quære*.
2. Said act contravenes sec. 6, art. IV of the state constitution, and the award of the commissioners under it is void, because it assumes to compensate the plaintiff for work done and materials furnished to the state under a contract, not at the prices specified in the contract, but by the rule of *quantum meruit* or *quantum valebant*.
3. The "extra compensation" to contractors with the state, forbidden by the constitution, includes all compensation *outside* of that provided for by the contract, and it is not necessary to determine whether the compensation allowed by the act of 1874 was *greater* than that fixed by the plaintiff's contract.

The plaintiff, in April, 1875, brought his action in this court against the state, to recover \$45,962.13, with interest on that sum from May 1, 1860; alleging that this amount was the balance due him, "according to the principles and at the rates and prices mentioned in chapter 323 of the laws of 1874,"

Carpenter vs. The State.

for work done and materials furnished in 1859 and 1860 by him as assignee of a contract for the state printing, etc., entered into between James Ross and the state. The substance of the complaint, and of the legislative acts therein referred to, is stated in the opinion.

The defendant demurred to the complaint on the grounds, 1. That it did not state a cause of action. 2. That it appeared from the face thereof that no action had accrued to the plaintiff by reason of the facts alleged, within six years before the action was commenced.

A. Scott Sloan, Attorney General, for the demurrer:

1. The amendment of 1875 (ch. 269) repealed sec. 6 of the act of 1874.* *State v. Ingersoll*, 17 Wis., 631; *Goodno v. Oshkosh*, 31 id., 127. The section was then reenacted, and, speaking from the time of such reenactment, it declares that no sum shall be paid the plaintiff "until the *next* legislature [i. e. the legislature of 1876] shall ratify," etc. This construction is in harmony with the rule that the revision of a statute operates as a repeal of such statute, and with *State v. Andrews*, 20 Tex., 230. The New York cases seem to be in conflict with the decisions of our courts, and are not supported by authority or reason. The evident intention of the legislature was to remit the whole subject to the ratification of a future legislature. The act of 1874 did not intend to fix the

* Sec. 6, ch. 323, Laws of 1874, was in these words: "It is hereby expressly declared by this act that no sum shall be paid to the said assignee until the next legislature shall ratify the award or finding, if any, of the same [said?] accountant and commissioners of public printing as herein provided." By ch. 269, Laws of 1875, said section was "amended so as to read as follows:" "It is hereby expressly declared by this act, that no sum shall be paid to the said assignee until the next legislature shall ratify the award or finding, if any, of the same accountant and commissioners of public printing as herein provided. Nothing in this section contained shall be construed to prevent the recovery of what may be found to be justly and equitably due said claimant according to the principles of this act. In case such legislature shall neglect or refuse to ratify the award of such accountant and commissioners, an action thereon may be brought by said claimant to recover the same."

Carpenter vs. The State.

liability of the state. It simply provided for a computation, for the ascertainment of certain facts to enable the legislature thereafter to determine whether the amount should be paid. Although the act speaks of an award and finding, there is no provision that the commissioners should find or award any sum to be due the plaintiff. By sec. 3 they were to report to the next legislature; and by sec. 6 nothing was to be paid unless such legislature should ratify. Now that legislature did not ratify, but evaded the responsibility, and, by a new enactment, provided that the legislature of 1876 may ratify, and that, if it fails to do so, then suit may be brought. The act of 1875 was passed on the 5th of March, within a week of the day previously fixed for the adjournment of that legislature, and after the time in which new business could be introduced. Every member knew that that legislature would not ratify; and if the intention had been to allow the plaintiff to bring suit without a ratification by any legislature, they would have said so in so many words. *Johnson v. Bush*, 3 Barb. Ch., 237-8. The whole action of the legislature of 1875 seems to evince a clear intention to postpone the consideration of plaintiff's claim to a subsequent legislature. The right to sue the state is a matter of favor, in derogation of that immunity which every sovereignty enjoys; and statutes conferring it should not be extended beyond their clear intention. *Rose v. The Governor*, 24 Tex., 496.

Geo. B. Smith, for the demurrer, argued, 1. That by the constitution of this state all printing and stationery required for the use of the legislature or of the state are required to be "let by contract to the lowest bidder," and the legislature is forbidden to grant any extra compensation to any contractor with the state. Art. IV, secs. 25, 26. 2. That by the constitution the secretary of state is *ex officio* auditor (art. VI, sec. 2); and as he cannot transfer his duties to any other person (10 Wis., 525), so no act of the legislature can transfer them.

Wm. F. Vilas, on the same side, argued that the plaintiff's

Carpenter vs. The State.

case, as stated in the complaint, rests wholly upon the theory that, by the act of 1874, the legislature (1) ratified the settlement alleged to have been proposed by Mr. Harvey, and adopted the estimates of experts made in pursuance thereof, as a valid award so far forth, or (2) itself proposed a like settlement of the claim, which plaintiff has accepted, or (3) that the act, with plaintiff's notice of submission and acceptance therein required, and his bond for costs, constitute a submission to arbitration, by reason of which the amount fixed by the accountant and the commissioners of printing is recoverable *as an award*. The act thus construed is in violation of sec. 26, art. IV of the state constitution, which forbids the legislature to grant extra compensation to any contractor with the state. Such compensation as exceeds that fixed by the contract is extra; and compensation awarded on any other basis of estimation than the contract is also extra the contract. If there is uncertainty in respect to the meaning of the contract, any dispute in respect to the amount to which the contractor is entitled, this raises purely judicial questions. If the legislature should intervene in such a case, it must either construe the contract, and determine the amount due upon it as so construed, or award compensation on some other basis than the contract. But the former of these is judicial duty, and the judicial power is vested by the constitution in the courts. An attempt in that direction by the legislature, although declared in the phrase of enacted law, is a mere offer to pay by one contracting party. Such an offer never binds the courts unless it be accepted, and an accord and satisfaction be made. If, on the other hand, compensation be awarded on some other basis than the contract, it may be fairly assumed that the same result can never be reached that would be reached by a judicial application of the contract. The parties, especially the claimant, would not desire a change in the basis of estimation if it produced no change in the result. Legislative interference, therefore, must give the contractor either

Carpenter vs. The State.

less or more than his contract price. If less, the act is clearly invalid without his consent, as he has always a legal right to recover the contract price; if more, the act is clearly invalid, as granting an extra compensation in every sense of that phrase. Since, then, the change of basis cannot be made without the contractor's consent, it must be assumed that in giving such consent he consulted his own interest, and therefore that the amount awarded him upon the new basis is greater than that fixed by the contract. It may be said that the legislature has presumably consulted the interests of the state. But it cannot lower the compensation; and therefore the interests of the state require the contract price to be adhered to. Again, this presumption will be made by the court from a due regard to its rules in practice and pleading. Any permissible change in the rates of compensation must be by making them less than those fixed in the contract; and this may be done by consent. Such a change must therefore be *defensive*. It is the defense of *accord*, which, to be good, must also aver satisfaction. *Palmer v. Yager*, 20 Wis., 91. For the plaintiff, however, to plead, as the basis of his action, a subsequent contract—to base his action on allegations defensive in their legal nature,—is to invert all the presumptions ordinarily attaching. It puts him to sue on what is naturally ground of defense. It puts the defendant to plead the true cause of action as his ground of defense. If the attorney general should make answer to this complaint that the contract fixed certain rates, and that the amount due plaintiff at those rates was fully paid him before the act of 1874 was passed, then it would appear that that act grants "extra compensation." So if the attorney general should answer that the contract price, although not fully paid, was less than the amount resulting from the new rates provided for in the act, that defense would impeach the act as granting extra compensation. Thus the action would be converted into a trial of the amount due under the contract, and the

Carpenter vs. The State.

court would award no more. Nay, the trial would be simply for determining the constitutionality of the act on which the plaintiff's action is based; and his action would fail when *the true amount due him* was ascertained, unless it appeared that he had *sued for less* than that amount. This would be a palpable inversion not only of the rules of practice, but of the principles of justice. It seems to follow that every attempt of the legislature to alter the rates of compensation to contractors for work done, is void; *prima facie*, at least, it is to give compensation in excess of the contract.

Again, the complaint states facts showing that the act of 1874 grants extra compensation. (1) It shows that the contract rates were in dispute fifteen years ago, and that the dispute was settled, and the parties accorded, and satisfaction was made. (2) It shows that Mr. Harvey, who was then the *auditor* of the state, acting as such, determined that only a certain sum was due plaintiff on the contract, which sum has been fully paid. The decisions of the secretary of state acting as auditor are *quasi-judicial*, and binding until reversed by the courts. *State ex rel. Crawford v. Hastings*, 10 Wis., 525; *Gough v. Dorsey*, 27 id., 119. His decision in this case is therefore decisive, *prima facie*, that the act of 1874 provides for extra compensation. And the act itself does not attack that decision of the auditor as an erroneous decision upon the contract, but seeks to award compensation upon principles entirely different from those of the contract.

Counsel further argued that the act and its acceptance could not be treated as a valid accord, because there was no valid preëxisting claim, and because, under the constitutional provisions already cited, the legislature was at least incapable of entering into any accord except as to the amount *due upon the contract*, and the act does not propose any inquiry into that amount, or any accord upon the contract. The language of Dixon, C. J., in *Hasbrouck v. Milwaukee*, 13 Wis., 50, is

Carpenter vs. The State.

applicable to the power of the legislature to *create* an obligation in such a case as this.

Nor does it better the plaintiff's case that the extra compensation is sought to be granted under the theory of an arbitration of the controversy. (1) There was no controversy as to the amount due plaintiff on his claim, as there was no valid claim. (2) As the state could not be made liable to the plaintiff except for the amount due him on his contract, the legislature could not submit his claim to arbitration upon terms outside of the contract. (3) All questions arising under the contract are *judicial* questions; and the entire judicial power of this state is vested in the courts mentioned in the constitution. Const., art. VII, sec. 2; *Martin v. Hunter's Lessee*, 1 Wheat., 304, 333-6. In cases of claims against the state, the constitution requires the legislature to direct in what courts suit may be brought. Art. IV, sec. 27. As the legislature cannot compel a private citizen to submit his rights to any arbitrators other than the courts, it would seem to be a reasonable inference that it cannot invest other tribunals with a judicial power for the trial of cases in which all citizens of the state are parties. But, however that may be, it cannot empower such a tribunal, or any court, to proceed to judgment in a particular case upon principles prohibited by the constitution. As it cannot directly grant to a contractor with the state any compensation determined by principles or considerations outside of his contract, it clearly cannot authorize any court or umpire to determine the amount due him upon such principles or considerations, and direct payment of the amount so determined.

Counsel further contended that the act of 1874 did not provide for submitting the plaintiff's claim to an arbitration, or provide for an award that should be binding on the state; that it expressly made payment of the sum ascertained by the printing commissioners upon the principles there stated dependent on a ratification of their finding by the legislature

Carpenter vs. The State.

of 1875; and that there was no such ratification. *U. S. v. Ames*, 1 Wood. & Min., 76; Caldwell on Arb., 61. He further contended that by sec. 6, as amended in 1875, even if it does not contemplate a ratification by the legislature of 1876, the plaintiff is merely authorized to bring suit for what may be "justly and equitably due according to the principles of the act"; that upon the most favorable construction of this language for the plaintiff, it merely authorizes him, in terms, instead of proceeding upon the contract, to sue for *compensation according to the rates* previously fixed by the experts and the commissioners, and does not relieve him from proving to the court the *items of work and materials* for which he claims pay according to those rates; and that, aside from the invalidity of the act, the complaint is bad because it does not give any statement of such work and materials, except by referring to the report of the commissioners, and treating that as an award or stated account. But the true construction of the section is, that it merely waives the defenses of accord and satisfaction, and of the statute of limitations, and permits plaintiff to recover any sum to which he may show himself entitled.

I. C. Sloan, for the plaintiff, contended that ch. 323, Laws of 1874, authorized a complete arbitration of the plaintiff's claims upon the equitable basis there described. By sec. 4 he was required to file in the office of the secretary of state a copy of the assignment from his former partner, and also a notice that he accepted the provisions of said act as a just mode of settling his claim against the state, and that he would accept and abide by the *award* that might be rendered in pursuance of the same, whether the sum *to be paid him by such award* be much or little, or nothing at all, as a fair settlement of all claims against the state of any kind, either in law or equity; and he was required to give security that if nothing should be found due him he would pay the expenses and charges of the accountant; all of which he did. This con-

Carpenter vs. The State.

stitutes a complete agreement for an arbitration; and after the award was rendered and submitted to the legislature, the amount of it became due the plaintiff from the state. Sec. 6 of the act had no further effect than the clause frequently inserted in contracts, that no money is to be paid until some superintendent or engineer has certified that the work and materials conform to the requirements of the contract. Any unreasonable refusal of such certificate does not prevent a recovery of the amount due by the terms of the contract. *Thomas v. Fleury*, 26 N. Y., 26. Said section was not intended to affect the validity of the award. It was merely a direction to the state treasurer not to pay until the legislature had approved it. It was intended to subject the award to the inspection of the legislature for the purpose of making it certain that the commissioners had kept within the limits prescribed in the act. If the language had been that the award should not be valid, or that the state should not be liable on it, until it should be ratified by the next legislature, there might perhaps have been some doubt as to its validity, until thus ratified; though even in that case it might be urged that one party to an arbitration cannot thus reserve the option to ratify it if in his favor, and repudiate it if adverse to him. But that question does not arise in this case, because sec. 6 only provided that the money should not be paid unless the next legislature should ratify the award. If it omitted to ratify, plaintiff could bring his action upon the award under Tay. Stats., 1789, § 1; and if the court in that action should be of opinion that the printing commissioners kept within the terms of the submission as prescribed by the act of 1874, plaintiff could recover the amount of the award. But, however it might be held if plaintiff's right rested upon the act of 1874, all doubt has been removed by ch. 269, Laws of 1875. The legislature of the latter year, instead of inspecting the award and determining whether it conformed to the terms of the submission, refer that question, and, as I think, that question

Carpenter vs. The State.

alone, to the court. The provision then added to section 6 declares, first, that it was not the intention of said section to prevent a recovery of the amount justly and equitably due the plaintiff according to the principles of said ch. 323; and second, that in case the legislature did refuse to ratify the award of the commissioners, an action might be brought *thereon*, that is, *on the award*, to recover the amount thereof. The only qualification which construction can make in this language is, that the court might examine the award so far as to determine whether it conformed to the principles of the act. The words "such legislature," as used in the proviso added in 1875, refer to the same legislature mentioned in the section as originally passed. Where a section of a statute is declared to be amended so as to read in a certain way, that portion of it which is merely copied without change is not to be considered repealed and reenacted, but as having been the law from the time of its first enactment; and the new provisions are to be understood as enacted at the time of amendment. *Ely v. Holton*, 15 N. Y., 595; *D. & L. Plankroad Co. v. Allen*, 16 Barb., 15; *Moore v. Mausert*, 5 Lans., 173; *S. C.*, 49 N. Y., 332. A *dictum* in *Goodno v. Oshkosh*, 31 Wis., 127, apparently conflicts with this doctrine; but it was decided by a divided court, and seems to be also in conflict with *Fullerton v. Spring*, 3 Wis., 667. See also *Laude v. C. & N. W. R'y Co.*, 33 Wis., 640.

T. R. Hudd, on the same side. [No brief on file.]

RYAN, C. J. Sec. 25, art. IV of the constitution, declares that the legislature shall provide by law that all stationery and printing for the state shall be let by contract to the lowest bidder. And sec. 26 declares that the legislature shall never grant any extra compensation to any public contractor after the contract shall be entered into.

Ch. 114 of 1858 was passed under the former section of the constitution, and provides for letting certain stationery and

Carpenter vs. The State.

printing by contract to the lowest bidder, and for the payment of the contractor accordingly.

Under this statute it appears that the plaintiff's assignor was the lowest bidder at the letting of 1858, and thereupon became contractor for two years for stationery and printing for the state at the stipulated prices of his bid, and that the plaintiff, as his assignee, performed the contract.

It appears that difficulties arose between the plaintiff and the state officers in relation to the plaintiff's compensation under the contract; that in 1860, pending the contract, the secretary of state, with the plaintiff's assent, caused experts to ascertain and report to his office rates of compensation for much of the work and material under the contract, at their actual value, without reference to the prices of the contract; that the secretary and the plaintiff agreed that all work and materials under the contract should be paid for *quantum valabant*; that a settlement was made between them for all the plaintiff's work and materials under the contract, and that the plaintiff was paid according to the settlement; that subsequently, upon the plaintiff's application, the legislature appropriated (ch. 293 of 1863), and the plaintiff accepted, a further sum certain in full for, and thereupon released the state from, all claim under the contract; but that the plaintiff, not satisfied with any settlement, applied to the legislature, in 1874, for an account of and settlement for all work done and material furnished under the contract.

Thereupon the legislature passed ch. 323 of 1874. This statute recites the facts in a preamble, and provides that, for the purpose of equitably settling the plaintiff's claims, the commissioners of printing shall appoint an expert to compute the actual amount of work done and material furnished under the contract; that thereupon the commissioners shall compute the same at the *quantum valebant* rates reported in 1860 to the secretary of state, as far as those rates apply, and the residue at just and equitable rates to be ascertained by the

Carpenter vs. The State.

commissioners; deduct all payments made on the contract, and report the balance, if any, due to the plaintiff on such computation, to the next legislature, "without regard to the terms or rates of bid on which the said contract was awarded; it being the intention of this act to ascertain the true and exact amount of labor performed and materials furnished under said contract, and to secure to the assignee of said contract just and equitable rates for each and every item of labor or materials, according to the regular established usages of the trade, as proposed by the secretary in 1860." The report of the commissioners is subsequently called an award, both in the statute itself and in the amendment, ch. 269 of 1875.

The commissioners of printing accordingly made the computation, and reported to the legislature of 1875 a large balance due to the plaintiff. The legislature made no provision for its payment. And this action is brought upon the report of the commissioners, as an award.

The plaintiff's counsel takes the position that the statute of 1874 submits the controversy to arbitration, and makes the report binding as an award upon the state. In our view, it is immaterial whether this is the true construction of the statute, or whether the legislature has power to make such a submission. Doubt of such a power is suggested in *State ex rel. Martin v. Secretary of State*, 38 Wis., 92, not there or here necessary to determine.

For, in any construction of the statute before us, it assumes to compensate the plaintiff for all work and material under his contract, not at the prices of the contract itself, but at prices ascertained *dehors* the contract and by a rule wholly independent of the contract.

Such compensation of a public contractor is prohibited by the constitution. Whether the prices of the contract were high or low, reasonable or unreasonable, the plaintiff has or had a right to recover them against the state; and neither secretary nor legislature could abridge that right. But he had

Carpenter vs. The State.

and has no right to recover for his work and material at different prices, and neither secretary nor legislature could or can, by any agreement or legislation, give him such a right. The exact measure of his right is determined absolutely by his contract, under the constitution; and there exists nowhere a discretion to vary it.

It was contended that the phrase, extra compensation, in the constitution, means additional compensation; that is, compensation added to or greater than that fixed by the contract. And it was urged that we could not hold the compensation of the statute to be within the prohibition, unless it should appear that the *quantum meruit* upon which it proceeds, would come to more in the aggregate than the contract prices. The same might be as well said of any statute releasing any contractor from the prices of his pending contract and substituting a *quantum meruit* or a gross sum for his entire compensation. Such a construction would go far towards surrendering the substantial prohibition for an uncertain shadow. And it seems to involve an absurdity in making the question of construction wait upon an issue of fact. Even in that crippled sense of the prohibition, it strikes us that perhaps it should affirmatively appear in such a statute that it is not an evasion of the prohibition; the presumption otherwise being against any departure from the contract prices. But we do not perceive how even such a construction would aid a statute applying a *quantum meruit* to a contract which the constitution directs to be made only with the lowest bidder, and providing for payment *quantum valebant* of services which the constitution appears to prohibit from being so paid.

But we hold that the word, extra, as used in the constitution, has a much more comprehensive meaning. It is true that the prohibition is to grant; and the latter word seems to favor the narrower construction. Apparently, the apprehension of additional compensation was a primary motive of the prohibition; but as apparently not the sole motive, or some

such word as additional would have been used. Grant, in such use, is altogether too loose and comprehensive a word to operate as a limitation of another. The second clause of the section prohibits the increasing or diminishing of the compensation of officers during their terms of office. The policy of the section as to officers and contractors seems to have been the same; to limit both to the very compensation at which they are employed, and to put that compensation beyond legislative interference. Therefore, as it appears to us, was the word, *extra*, chosen.

The word is Latin, signifying without, or outside of. In its simple form, it has been but lately admitted into English dictionaries; but its compound use is ancient. *Extraordinary* gives a familiar instance of its use; signifying outside of the ordinary, not greater or less; for a thing may be extraordinary for greatness, or for littleness, or for neither. So it is of *extra compensation*, which is also properly a compound phrase. *Extra compensation* is such, not merely for being greater or less than the contract, but, properly because it is outside of the contract. A public contractor might doubtless agree to reduce the compensation of his contract; and the legislature could act on such voluntary reduction. But surely a statute, passed *in invitum*, expressly lessening the compensation fixed by a public contract, would be as plainly within the section as a statute so passed expressly lessening the compensation of a public officer during his term of office. In this sense, the word of the constitution is of old and familiar use in legal terms: *extra judicial*, *extra territorial*, *extra parochial*, *extra dotal*, *extra feudum*, *extra viam*, *extra quatuor maria*. And we believe that this word is used in this sense, in preference to others, in the prohibition, for the very purpose of effectually preventing all legislative tampering with the fixed prices of public contracts.

Legislative history points and sanctions the policy of the constitution. It indicates the purpose of the section to save

Carpenter vs. The State.

the legislature from the importunity of public contractors and servants, and the treasury from the discretion of the legislature in their favor; to limit contractors with the state, beyond pretense and device, to the precise compensation fixed by their contracts. Under this salutary restraint, no misfortune or rapacity can ever avail in a court of justice, by any artifice or circuitry, to change the rule of recovery on a contract with the state. Where there is no fraud or mistake which would authorize a court to avoid or reform any contract, the contract itself must govern. If the compensation be too high, the state must bear the loss; if too low, the contractor must suffer it. The constitution leaves no room to legislature or court for equitable considerations of *quantum meruit*. We cannot say that the statute before us is not equitable; but we do hold that it is not constitutional.

And the award of the commissioners, if award it be, founded on *quantum meruit*, without regard to the terms or rates of bid on which the contract was awarded, is absolutely void, and cannot sustain an action. •

It was indeed contended by the plaintiff's counsel, that the complaint might be taken as proceeding on the contract. It does not state the contract prices, or go at all upon them. It goes expressly for a *quantum meruit*, under the statute. And it is immaterial to our view whether it be on the contract or on the award.

We cannot properly decide on this demurrer whether the plaintiff may not have some good cause of action under the last clause of the first section of the amendment of 1875. We therefore sustain the demurrer of the attorney general, with leave to the plaintiff to amend his complaint.

By the Court. — So ordered.

In re Murphey.

IN RE MURPHEY.

CRIMINAL CONTEMPT. *Judgment or order not reviewable on appeal.*

1. An appeal does not lie to this court from an order or judgment in a *criminal* action or proceeding.
2. A person convicted of and fined for a criminal contempt, by the circuit court, cannot bring the order or judgment of conviction to this court by *appeal*; and the fact that the contempt consisted in disobedience to an order made in a civil action, does not affect the rule. *Ballston Spa Bank v. Marine Bank*, 18 Wis., 490; *Witter v. Lyon*, 34 id., 560; *Lamonte v. Pierce*, id., 483; and *In re Day*, id., 638, distinguished from this case; and *Haight v. Lucia*, 36 Wis., 355, criticised.

APPEAL from the Circuit Court for *Milwaukee* County.

The circuit court made an injunctive order in a civil cause, restraining the plaintiffs therein, their attorneys, etc., from procuring an order from any court or officer preventing or interfering with a sale, as theretofore advertised, of certain lands which the judgment in the cause directed to be sold. *Mr. Murphey* was not a party to that action, but was attorney for the plaintiffs therein. Subsequently such proceedings were had in the same court, that an order was made or judgment rendered by the court convicting *Mr. Murphey* of a violation of such injunction, adjudging him in contempt therefor, and imposing upon him a fine of \$125. From such order or judgment, *Mr. Murphey* appealed to this court.

N. S. Murphey, appellant, in person.*H. M. Finch*, *contra*.

LYON, J. The defendant was convicted of willful disobedience of an order of the court, and was adjudged in contempt because of such disobedience, and fined therefor. Looking at its results (whatever it may have been in its inception), the proceeding is not a controversy between certain parties to the civil action out of which it arose, and the appellant, in which the former seek indemnity for the wrongful act of the latter,

In re Murphey.

but a public prosecution, by which the state seeks to vindicate the authority of one of its courts and to punish the defendant for an alleged interference therewith. It is quite immaterial that the alleged contempt was committed in the progress of a civil cause. It was essentially a criminal contempt (R. S., ch. 119, sec. 7), and the court sought to punish it as such by imposing a fine upon the defendant, which, if paid, goes to the school fund. Const., art. X, sec. 2. No party to the civil cause has any more interest in the conviction and punishment of the appellant than has any other citizen of the state.

That an appeal to this court does not lie from a judgment or order in a criminal case or proceeding, has been frequently adjudicated by this court, and is now too well settled to be questioned or doubted. *State v. Chappell*, 10 Wis., 10; *State v. Mushied*, 12 id., 561; *In re Fenelon*, 37 id., 231; *State v. Brophy*, 38 id., 413.

In the above cases the distinction between those proceedings for contempt which merely result in enforcing civil remedies and those which result in the imposition of criminal punishment, as affecting the right of appeal, is stated and considered.

In *Haight v. Lucia*, 36 Wis., 355, on appeal, we reversed an order or judgment imposing a fine upon a party for a contempt of court. But the question of the appealability of such order or judgment was not raised or considered. Had it been, we cannot doubt that the appeal would have been dismissed.

The cases of *Ballston Spa Bank v. The Marine Bank*, 18 Wis., 490, and *Witter v. Lyon*, 34 id., 564, cited by the learned counsel for the appellant as sustaining this appeal, are not in point. In the first of these cases it was held that an order discharging a person who had property of the judgment debtor or was indebted to him, from process for contempt for refusing to answer questions properly put upon examination in supplementary proceedings, was an appealable order. In

Flanders vs. McDonald.

Witter v. Lyon, the appeal was from an order discharging a former order requiring the respondent to show cause why he should not be punished as for a contempt for an alleged violation of an injunction. The appeal was upheld. So also in *Lamonte v. Pierce*, 34 Wis., 483, it was held in effect that an order granting an attachment against the appellant as for a contempt in unlawfully refusing to appear in supplementary proceedings, was appealable. And in *In re Day*, id., 638, an order adjudging the appellant guilty of contempt, and requiring him to indemnify the party injured for the loss caused by his wrongful act, was held to be appealable.

In each of the cases cited in the last paragraph, the order from which the appeal was taken was made in a civil action, and concerned the private rights and remedies of parties thereto. The distinction between those orders and the order or judgment from which this appeal was taken, is apparent. It must be held that a person convicted of and fined for a criminal contempt by the circuit court, cannot appeal to this court from the order or judgment of conviction.

The question is not before us, whether the order from which the appeal was taken can be reviewed by this court under any circumstances.

By the Court.— Appeal dismissed.

FLANDERS vs. McDONALD.

1. The printed cases on this appeal having been actually served December 30, 1875, and retained, a motion made on the 1st of February following, to dismiss the appeal because such cases were not served fifteen days before the commencement of the term, was too late. *Hundhausen v. Atkins*, 36 Wis., 250.
2. An order dissolving an attachment of property is reversed, on the ground that defendant's own affidavits plainly indicate an intent, participated in by all concerned adversely to the attachment, to place defendant's property beyond the reach of his creditors.

Flanders vs. McDonald.

APPEAL from the Circuit Court for *Juneau* County.

The plaintiff appealed from an order dissolving an attachment previously granted against defendant's property.

The merits of the appeal, and a motion to dismiss it upon grounds stated in the opinion, were argued at the same time.

J. G. Flanders, for the appellant.

James B. Taylor, for the respondent.

COLE, J. The motion to dismiss the appeal because the printed cases were not served fifteen days before the commencement of the present term, must be denied. The cases were actually served on the respondent's counsel on the 30th of December last, and retained. The motion to dismiss was made and heard on the 1st of February. Under the decision in *Hundhausen v. Atkins*, 36 Wis., 250, the motion was too late.

The appeal is from an order dissolving and setting aside an attachment. The affidavit stated, as grounds for the attachment, that the defendant had assigned, disposed of or concealed, or was about to assign, dispose of or conceal, his property with intent to defraud his creditors; and that the defendant had fraudulently conveyed or disposed of his property, or a part of it, with intent to defraud his creditors. The defendant traversed these statements in the affidavit; and the court, on that issue, dissolved the attachment.

The evidence is ample and clear of the existence of some, if not all, of these grounds for an attachment. The transactions between the defendant and the Blackmans, as detailed by themselves, are inconsistent with any fair and honest course of dealing. They plainly indicate an intent, participated in by all concerned, to place the defendant's property beyond the reach of his creditors. The defendant was embarrassed and unable to pay his debts. Upon being pressed by the plaintiff for payment of his claims, he turns over to the Blackmans, or sells to them, his brick yard property, worth \$2,000 or more.

Griffiths vs. Kellogg.

He says that he was owing Reuben Blackman a board bill of \$200, and that he first placed this property in Reuben's possession to enable the latter to make the amount of the debt by sale of the brick. A few months later he sells the property to A. W. Blackman — an irresponsible person,— taking a note for \$150. And afterwards he makes another sale of the property to the same vendee, taking another note of a like amount. During all this time he was dealing with the property as his own, and as if he had never parted with the title. It is impossible to account for all these acts upon the theory that the parties were dealing with each other in an honest, business-like manner. The transactions, upon their very face, bear conclusive evidence of fraud and evil intent. And we fully concur in the correctness of the remark of plaintiff's counsel, that if the attachment was not warranted in this case, it is impossible to conceive of a case where an attachment would lie for a fraudulent disposition of property, accomplished or meditated with intent to defraud creditors.

By the Court.— The order of the circuit court dissolving the attachment is reversed, and the cause is remanded for further proceedings according to law.

GRIFFITHS VS. KELLOGG.

PROMISSORY NOTE. (1) *When maker, whose signature is obtained by fraud, not liable, even to innocent holder.* (2) *Query, whether purchase at discount, without indorsement or inquiry, is bona fide.* (3) *Finding of jury as to maker's negligence in signing, final.*

1. Where an instrument in the form of a negotiable promissory note of the defendant was not voluntarily made by her, but her signature was procured by a fraud practiced upon her, under pretense of getting her to sign a different note for a less sum, it was *not her note*, and she is not liable upon it, even to an innocent holder.

Griffiths vs. Kellogg.

2. Whether one who purchases commercial paper at a great discount, from a stranger, without indorsement and without making inquiry within his power, can always be held to be a *bona fide* purchaser, *quære*.
3. The question whether defendant, who was unable to read the paper signed by her, was guilty of negligence to estop her from denying, as against a *bona fide* purchaser, that she made the note, having been fairly submitted to the jury, and the court below having refused a new trial after a verdict in her favor, this court would not reverse the judgment on the ground that she was guilty of such negligence, even if disposed to think differently from the jury.

APPEAL from the Circuit Court for *Rock* County.

Griffiths brought his action in justice's court upon a promissory note for the sum of \$76.25, alleged to have been made by the defendant *Pluma Kellogg* to the order of Gillespie Bros., and by them sold and assigned to plaintiff before maturity. The answer admitted the making of a note for \$47.50, but denied having executed any note for \$76.25. Defendant had judgment, from which plaintiff appealed to the circuit court. Upon the trial there, plaintiff offered in evidence the following note:

“\$76.25.

May 6, 1874.

“Six months after date I promise to pay to the order of Gillespie Bros., or bearer, seventy-six 25-100 dollars, at the First National Bank of Janesville, value received, with use at ten per cent.

PLUMA KELLOGG.”

Defendant testified that the note was given for a lightning rod; that she agreed with Johnson, the agent, sometime in May, to give him a note for \$47.50, the price of the rod, payable in six months or one year from the following fall. He drew up a note for \$47.50, payable in six months, which she refused to sign. He then drew another note, and read it as for the same amount, payable six months or a year from the following fall. Witness signed this note, but did not read it, being unable to read it without her glasses, which were at the house of a neighbor. Johnson then gave witness the following obligation:

Griffiths vs. Kellogg.

“\$47.50.

May 6, 1874.

“I hereby agree to extend the obligation of Mrs. P. Kellogg at the expiration of six months until the following fall one year.

JOHNSON & CLARK.”

Witness further testified: “After he had finished, he read the obligation and I saw he hadn’t put down the amount, and I asked him if he would not please put down the amount of \$47.50 on that obligation, the amount in the note as he read it. He read the last note payable in six months or a year from the following fall and for \$47.50; and that is what I supposed it was when I signed. I refused to sign a note payable absolutely in six months. I never intended to sign a note of \$76.25. I never heard of that amount. There was no such agreement ever made between us.” Defendant further testified that two of her children were present at the time, who could read writing, but she did not ask them to read the note before signing; that the note read was payable to Gillespie Bros., without any “bearer” to it; that “he was not to sell the note; they said they would not sell it, and that they always held them.”

The two children of defendant were sworn, and their testimony corroborated hers.

Plaintiff, in rebuttal, testified that he knew nothing of the circumstances under which the note was given; that he bought it before maturity, and paid \$65 for it and another note of \$10; and that he did not know what Johnson’s business was when he purchased the notes of him, but learned afterwards.

Verdict for defendant; and, a new trial being denied, plaintiff appealed from a judgment on the verdict.

E. F. Carpenter, for appellant, argued that, since defendant had failed in any way to connect plaintiff with the alleged transaction with Johnson, she could not avail herself of anything in that transaction as a defense, especially as it was proven affirmatively that plaintiff bought the note for value

Griffiths vs. Kellogg.

before maturity, and without notice of any equities existing between the original parties. It is assumed by the defense that this court has established a new rule in regard to commercial paper in the hands of a *bona fide* purchaser for value, before maturity, and without notice; but the cases relied upon are clearly distinguishable from this. See *Walker v. Ebert*, 29 Wis., 194; *Kellogg v. Steiner*, id., 626. The evidence shows clearly that defendant was guilty of negligence by which she is estopped, as against an innocent purchaser for value, from asserting that she intended to sign a different obligation, or that any statements made to her were false. *Chapman v. Rose*, 56 N. Y., 137; *Putnam v. Sullivan*, 4 Mass., 53; *Douglas v. Matting*, 29 Iowa, 498. Where the maker or indorser of a note, or the drawer or indorser of a bill, negotiable by the law merchant, executes the same in such form or under such circumstances as to allow himself to be defrauded and deceived as to the amount, he will be conclusively estopped by his own negligence from setting up such fraud or deception as a defense in a suit by a *bona fide* holder for value, who purchased before maturity and without notice. *Garrard v. Hadden*, 67 Pa. St., 82; *Redlich v. Doll*, 54 N. Y., 234; *Michigan Bank v. Eldred*, 9 Wall., 550; *Rainbolt v. Eddy*, 34 Iowa, 440.

The cause was submitted for the respondent on the brief of *Bennett & Sale*, who contended that the defense went back of all questions of negotiability, or of *bona fide* holders, to the validity of the instrument itself. It is idle to talk about the enforcement of a note which never had any legal existence. Yet, should the doctrine contended for by the plaintiff prevail, it could not be applied to nonnegotiable paper, such as this would have been had it been drawn in accordance with defendant's agreement, embodied in the contract assented to by her. *Taylor v. Atchison*, 54 Ill., 196; *Wait v. Pomeroy*, 20 Mich., 425; *Loomis v. Ruck*, 56 N. Y., 462. To the point that the testimony as to what occurred between the original

Griffiths vs. Kellogg.

parties was admissible, see *Walker v. Ebert*, 29 Wis., 194; *Kellogg v. Steiner*, id., 626; *Butler v. Carns*, 37 Wis., 61. 2. The question whether the defendant was guilty of such negligence, in putting her signature to the note, as would deprive her of the defense set up, was one for the jury, and was fully and fairly submitted to them, and was finally disposed of by their verdict.

RYAN, C. J. We shall not attempt to examine the very many exceptions in this case, but will content ourselves with passing upon the questions arising on the record.

The question was very fully and fairly submitted to the jury, whether the respondent voluntarily made the note in suit, or whether her signature was procured to it by a fraud practiced upon her under pretense of getting her to sign a different note for a less sum which she really owed to the lightning-rod man. The jury found that the fraud was practiced upon her, and that she did not voluntarily make the note in suit. We entirely concur in the verdict. It is impossible to read the evidence without coming to regard the transaction as a fraudulent imposition upon the respondent. The note in suit was as little hers as if the transaction between her and the lightning-rod man had not taken place, and he had forged the note. If not forgery, it was akin to forgery. And the note so obtained is not the contract of the respondent. This is not an open question in this court. *Walker v. Ebert*, 29 Wis., 194; *Kellogg v. Steiner*, id., 626; *Butler v. Carns*, 37 id., 61; *Chipman v. Tucker*, 38 id., 43; *Roberts v. McGrath*, id., 52; *Roberts v. Wood*, id., 60.

It was, indeed, contended that this doctrine is not applicable to negotiable paper, when the maker is not deceived as to the nature of the paper, but only as to the amount or other details of it. But it has been frequently applied to negotiable paper in this court. See the cases cited *supra*. The language of DIXON, C. J., in *Walker v. Ebert*, approved in *Chipman v.*

Griffiths vs. Kellogg.

Tucker, explains the rule and the reason of the rule, and is conclusive of its application. "The inquiry in such cases goes back of all questions of negotiability or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker. For the purpose of setting on foot or pursuing this inquiry, it is immaterial that the supposed instrument is negotiable in form, or that it may have passed to the hands of a *bona fide* purchaser for value. Negotiability in such cases presupposes the existence of the instrument as having been made by the party whose name is subscribed; for, until it has been so made and has such actual legal existence, it is absurd to talk about a negotiation, or transfer, or *bona fide* holder of it, within the meaning of the law merchant."

The protection of the law merchant to a *bona fide* holder of negotiable paper is not absolute. He runs the risk of the validity of the paper which he purchases, for which he relies not on the maker, but on his immediate indorser. And question might be made whether one who purchases commercial paper, at a great discount, from a stranger, whose name he does not well know, without indorsement, without inquiry within his power, as the appellant did, can always be held to be a *bona fide* purchaser.

Whether the respondent, being unable to read the paper which she signed, was guilty of negligence to estop her from setting up this defense against a *bona fide* purchaser, was fairly submitted to the jury, and answered by their verdict for her. The jury who gave the verdict, and the learned judge of the court below who refused a new trial, saw and heard the respondent and her children testify, and were better able to judge than we are whether her not appealing to her children for assistance was negligence under the circumstances.

Baass vs. The Chicago & Northwestern Railway Company.

And even if we were disposed to think differently, we should not feel at liberty to disturb the verdict or the order denying a new trial, on that ground.

By the Court.—The judgment of the court below is affirmed.

BAASS VS. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

FORECLOSURE OF MORTGAGE. *Parties defendant. Right of mortgagor to have priority of his trust deed to a third person determined in the case.*

1. The defendant in a mortgage foreclosure, claiming that a trust deed of the premises executed to a third person is prior to the mortgage in suit, has a right to have that question determined in the action, and for that purpose to have the grantee in such deed made a defendant.
2. There was no error, therefore, in refusing to vacate an order that such grantee be made a defendant, although plaintiff offered to stipulate "for the purposes of this case," that the lien of said deed was prior to that of his mortgage; such stipulation not being conclusive of the question as against other parties, nor, perhaps, as against the plaintiff himself in any other action or proceeding.

APPEAL from the Circuit Court for *Dane* County.

This appeal is from an order refusing to vacate a previous order requiring that the Farmers' Loan & Trust Company be made a defendant in the action.

The record returned to this court does not include the pleadings; but it appears from the motion papers that the action is to foreclose a mortgage on certain lots in the city of Madison, given to secure the payment of \$500 and interest; that said mortgage purports to have been executed in July, 1870, and recorded in September, 1874; that in April, 1871, the defendant executed a trust deed or mortgage upon a large amount of real estate, including said lots, to the Farmers'

Baass vs. The Chicago & Northwestern Railway Company.

Loan & Trust Company, to secure its bonds for \$3,900,000, which instrument was duly recorded during the same month; and that the defendant has been in the constant possession of said mortgaged premises ever since the spring of 1871. On motion of the defendant, the court made an order requiring that the said Trust Company be made a defendant in the action. The plaintiff moved the court to vacate such order, and at the same time tendered a stipulation as follows: "Whereas it is claimed on the part of the defendant that the Farmers' Loan & Trust Company, and the Union Trust Company, corporations of the state of New York, hold mortgages covering the mortgaged premises described in the complaint in this action, which mortgages were recorded in the office of the secretary of state of Wisconsin prior to the time the plaintiff's mortgage was recorded in the office of the register of deeds for Dane county, Wisconsin, and that in consequence thereof the said corporations are necessary parties to this action: Now, therefore, in order to avoid the necessity of making them parties, it is, for the purposes of this case, providing such order be vacated, hereby stipulated that the plaintiff in this action waives all claim of priority over the said mortgages or deeds of trust given to the corporations aforesaid, and admits that the same are incumbrances on the premises described in said mortgage set out in the plaintiff's complaint in this action, superior and paramount to said mortgage."

The motion was denied, and the plaintiff appealed.

B. J. Stevens, for appellant:

In this country, where, on foreclosure of a mortgage, a sale of the mortgaged premises is decreed, the practice as to parties defendant is different from that in England, where payment is obtained by the mortgagee taking possession and reimbursing himself from the rents and profits. Here the general rule is, that the only proper parties to the foreclosure suit are the mortgagor and mortgagee and those who have ac-

Baass vs. The Chicago & Northwestern Railway Company.

quired rights or interests under them subsequent to the mortgage. *Eagle Fire Ins. Co. v. Lent*, 6 Paige, 635; *Western Ins. Co. v. Eagle Fire Ins. Co.*, 1 id., 284; *Holcomb v. Holcomb*, 2 Barb. (S. C.), 23; *Lewis v. Smith*, 11 id., 158. Prior incumbrancers are not necessary parties. *Farwell v. Murphy*, 2 Wis., 533, 541; *Strobe v. Downer*, 13 id., 11; *Walker v. Jarvis*, 16 id., 28; *Mims v. Mims*, 1 Humph., 425; *Rose v. Page*, 2 Sim., 471. It has always been, so far as we know, the invariable practice in this state to foreclose and sell mortgaged premises subject to the rights of prior incumbrancers. The only possible object in making them parties would be to sell the premises free from all incumbrances, satisfying them from the proceeds of the sale in the order of their priority. This cannot be done where, as in this case, the prior mortgages are not due.

Smith & Lamb, for the respondent, argued, among other things, that the proposed stipulation would be utterly immaterial unless the Trust Company were made a party to the suit, so that it and its assigns, as well as defendant, could have the benefit of the judgment stipulated for, as an estoppel against plaintiff and his representatives hereafter; that it is doubtful whether the judgment as to that point would be conclusive even between the *parties*, very respectable authorities holding a judgment to be an estoppel only as to matters litigated by parties actually contesting the question before the court (*Wadham v. Gay* (Ill. Sup. Ct.), 14 Am. Law Reg., 419, 427; *Jenkins v. Robertson*, L. R., 1 Scotch App. Cas., 117); that if the Trust Company were not made a defendant, the respondent might not be in a position to insist on all the rights of that company, even where the protection of those rights might be incidentally very advantageous to the respondent; that if, for example, the question whether respondent bought the land in good faith, without knowledge of plaintiff's mortgage, should be adjudged adversely to it, the court might refuse to hear the respondent as to the rights of its

Baas vs. The Chicago & Northwestern Railway Company.

subsequent grantee in trust; that it is the respondent's absolute right under the statute (Tay. Stats., 1421, § 23) to have all persons interested in the subject matter of the controversy brought in as parties; and that such is also the general rule of equity (*Armstrong v. Pratt*, 2 Wis., 299), and priority between mortgages is peculiarly a proper question to be litigated in a suit to foreclose one of them. *Sup'rs v. R. R. Co.*, 24 Wis., 122.

LYON, J. The record does not give the name of the mortgagor, or inform us of the title claimed by the defendant; but we gather from the argument that the mortgagor conveyed the mortgaged premises to the defendant by a deed junior in execution, but senior in record, to the mortgage in suit. On the record before us it is uncertain whether the trust deed is prior or subsequent in right to the mortgage. If prior in right, it seems to be conceded that the Trust Company is not a necessary or proper party to the action; but otherwise if the same is subsequent in right.

Were the stipulation conclusive on that question — did it render the trust deed prior in right to the mortgage in all proceedings, and in favor of or against all persons who have now, or may hereafter have, an interest in the mortgaged premises,—it would seem entirely unnecessary to make the Trust Company a party to the action. But such is not the effect of the stipulation. It may be that the trust deed is subject to the mortgage; and if so, notwithstanding the stipulation, no good reason is perceived why any person interested, other than the plaintiff, may not be heard to assert the fact. Indeed, it is not certain that the plaintiff himself may not assert it in any other action or proceeding; for the stipulation is tendered only "for the purposes of this case."

It seems to us that the defendant has the right to have the question determined in this action, whether the trust deed or the mortgage in suit has priority; and because the offered

Jones and another, Adm'rs, vs. Williams.

stipulation does not determine that question, and because it cannot be conclusively determined without the presence of the Trust Company, we think the circuit court properly refused to vacate the order making that company a party defendant in the action.

By the Court.—Order affirmed.

JONES and another, Adm'rs, vs. WILLIAMS.

Appropriation of payments; when doctrine inapplicable.

1. In the case of a creditor having several demands against the debtor, it is only where the latter makes a payment with opportunity to exercise his right to appropriate the same, and neglects to do so, that the creditor acquires the right of appropriation.
2. Plaintiffs' decedent held a note of defendant, and also had charge of his mill, as an employee, and from time to time drew out money and charged it to himself in the day book kept at the mill. *Held*, that the amounts so taken and charged constituted cross demands or setoffs in defendant's favor, on an accounting between the parties, and were not *payments* of which defendant could make an appropriation, or to which the principles of the application of payments apply.
3. In an action for the value of such decedent's services in the mill, therefore, it was error to instruct the jury that the moneys so taken might be applied as payments to the note, if the jury should find that defendant had not elected to apply them in payment of the services.

APPEAL from the Circuit Court for *Columbia* County.

This action was brought to recover the amount of a note for \$1,560 at one year from date, with interest at ten per cent., executed February 1, 1867, by the defendant to Owen Griffiths, the plaintiffs' intestate; and also to recover for labor and services alleged to have been performed by said Griffiths as a miller, for the defendant, at his request, at his grist and flouring mills in Danville, Dodge county, and Cambria, Columbia county, from February 1, 1867, to June 25, 1872, of the value

Jones and another, Adm'rs, vs. Williams.

of \$3,078, with interest. The defendant answered the statute of limitations as to the note, and also denied all the facts alleged as the second cause of action, and averred in substance, that Griffiths was employed between February 1 and October 1, 1867, in the mill at Danville, owned by the defendant and another person, and had been paid in full for the services then rendered; and that from October 1, 1867, until the death of said Griffiths in July, 1872, he was partner with plaintiff in the Cambria mill, owning a one-third interest; that the purchase price of the mill was \$10,500; that as Griffiths had not sufficient means to pay for his one-third of it, defendant, by their mutual agreement, took the deed of the mill in his own name, and held the title as security for the money advanced by him in the purchase thereof; that Griffiths agreed to allow "a claim of about \$1,600 which he then held against defendant, to be used in the purchase of said mill;" that defendant and Griffiths afterwards expended, in improving the mill, about \$18,000, a considerable portion of which was paid out of the earnings of said mill, and the remainder was advanced by the defendant; that while defendant and Griffiths were thus carrying on the business, the latter was in charge of the machinery and the running of the mill, while Griffiths had charge of the books and business of the firm; that the latter drew out from the business and charged to himself, upon the books of the firm, a large sum of money, which, with the money paid out for his funeral expenses, amounted to \$1,464.40, as appears from said books; and that since Griffiths' death the defendant had paid to his widow for her support out of the earnings of said mill, \$439.34. The answer further alleges that Griffiths, at the time of his death, was largely indebted to defendant for money advanced for the purchase and improvement of said mill property; and the defendant is, and at all times since the death of Griffiths has been, ready to settle with his representatives the business of said partnership.

Jones and another, Adm'rs, vs. Williams.

At the trial, plaintiff's evidence tended to show that Griffiths worked for the defendant at the Cambria mill from the fall of 1867 until a short time before his death in 1872; that he attended to the grinding, etc., and his services were worth from \$45 to \$50 per month. The defendant's evidence tended to support the averments of his answer as to a joint purchase of the mill and a partnership in the business. It appears that the note in suit was found among Griffiths' papers after his death. It was admitted that the legal title to the Cambria mill continued to be in the defendant during the whole period in question.

The court submitted to the jury the question of fact as to whether Griffiths was a partner in the mill business or a hired servant. It refused an instruction asked by the defendant, to the effect that, if Griffiths was in the defendant's employ, and during that time had drawn from defendant a large sum in goods and money, this was a valid offset to his claim for services, and could not be defeated by any claim of plaintiffs against the defendant which was barred by the statute of limitations. At plaintiffs' request the court gave instructions, which are sufficiently recited in the opinion, to the effect that the amounts received by Griffiths might be applied by the jury to the payment of the note, if they found that there was no partnership.

Verdict for the plaintiff for \$3,461.54; a new trial was denied; and defendant appealed from a judgment on the verdict.

S. U. Pinney, for the appellant, as to the general rule governing the application of payments, cited 2 Parsons on Con., 629; Willard's Eq., 92-103; *Cremer v. Higginson*, 1 Mason, 338. As to the time when the debtor or the creditor must exercise his right of appropriation, he cited *Allen v. Culver*, 3 Denio, 284; *Philpott v. Jones*, 2 Ad. & El., 41; *Wright v. Laing*, 3 Barn. & Cress., 165; *Arnold v. The Mayor*, 4 Man. & G., 860; and contended that at whatever time this right is

Jones and another, Adm'rs, vs. Williams.

to be exercised, it is not conclusively done by entries in the books of either party, until those entries are communicated to the other party. *Simson v. Ingham*, 2 Barn. & Cress., 65. He further argued that according to the theory of the plaintiffs, Griffiths' services should have been credited to him on the mill books in which the payments were entered, so that this dealing would constitute a running account between Griffiths and defendant; and that in that case the money so drawn and charged to Griffiths should, as a matter of law, be applied to the extinguishment of the other side of the account, in the order of time in which the several items stood in the account, no special appropriation of payments having been made by either party (*Clayton's Case*, 1 Merivale, 572, 604, 608; *U. S. v. Kirkpatrick*, 9 Wheat., 720, 737-8; *U. S. v. Wardwell*, 5 Mason, 82); that a note is in no sense a part of an account, though, if the debt evidenced by it had been carried into an account, as in some of the cases, it would be considered as a part of it for the purposes of this rule (*Simson v. Ingham*, *supra*; *Truscott v. King*, 2 Seld., 165); that the acts of Griffiths in keeping the accounts as he did, show that he intended the money to apply elsewhere than on the note, on which no indorsements were made; that his election of such application may be manifested by circumstances, of which the jury are to judge (*Taylor v. Sandiford*, 7 Wheat., 13); but that if there was no application by either party, the court should have directed the payments to be applied to the claim for wages. He further contended that the rule requiring an appropriation by the creditor to be made either when the money comes to his hands (*Smith v. Wigly*, 3 Moore & Scott, 175; *Logan v. Mason*, 6 Watts & Serg., 14), or at a reasonable time before controversy has arisen, or at farthest at the time the action is brought (*Allen v. Culver*, *supra*; DANIELS, J., in *Jones v. U. S.*, 17 How., 688-92), is the more just and reasonable one, and sustained by the weight of authority (*U. S. v. Kirkpatrick*, *supra*; *Robinson v. Doolittle*,

Jones and another, Adm'rs, vs. Williams.

12 Vt., 246; *Callahan v. Boaznan*, 21 Ala., 246; *Gass v. Stinson*, 3 Sum., 98; *Franklin Bank v. Pratt*, 31 Me., 501; *Fairchild v. Holly*, 10 Conn., 184; *Moss v. Adams*, 4 Ired. Eq., 42); that the question was set at rest in this state by *Stone v. Talbot*, 4 Wis., 442; that this case does not fall within the principle of the application of payments to distinct debts, because only *the balance* of an account is considered a debt, but falls under the rules on which merchants' accounts are cast and settled by the law (1 Am. Lead. Cas., 291, and cases cited in note 5; *Sanford v. Clark*, 29 Conn., 457); and that the amount of moneys charged to Griffiths is simply a cross demand, and not a payment. He further contended that, the statute of limitations being insisted on, plaintiff's claim on the note is as effectually *extinguished* as though it had been paid or released (*Brown v. Parker*, 28 Wis., 21; *Howell v. Howell*, 15 id., 60, 61; *Sprecher v. Wakely*, 11 id., 432, 440); that the statute is designed as a security against the loss of evidence (*Pritchard v. Howell*, 1 Wis., 131), and the legal presumption is that defendant has a valid defense against the note; and that, therefore, if the sums charged to Griffiths are to be treated as payments at all, no appropriation of them having been made before this action was brought, the court could not now properly apply such payments on the note.

A. Scott Sloan, for respondents:

The rule seems to be settled, that where there has been no actual application of the payment by the debtor, and none implied from the circumstances, his right to control the application is lost, and the right after that belongs exclusively to the creditor, who may apply it on which debt he pleases. *Bradly v. Hill*, 1 Mo., 225; *Smith v. Applegate*, 1 Daly, 91; *Allen v. Culver*, 3 Denio, 285; *Clark v. Burdett*, 2 Hall, 197; *Hutchinson v. Bell*, 1 Taunt., 558; *Mills v. Fowkes*, 5 Bing. N. C., 455; *Williams v. Griffith*, 5 Mees. & Wels., 300; *Heilbron v. Bissell*, 1 Bailey's Eq., 430; *Mayor v. Patten*, 4 Cranch,

Jones and another, Adm'rs, vs. Williams.

317; *Stone v. Talbot*, 4 Wis., 442. And this application by the creditor may be made at any time, even at the trial (*Bosanquet v. Wray*, 6 Taunt., 597; *Philpott v. Jones*, 2 Ad. & El., 41; 4 Cranch, 317; 3 Denio, 285; 5 Bing. N. C., 450; 4 Wis., 442), and may be made to any debt not illegal, even though barred by the statute of limitations. *Cruickshanks v. Rose*, 1 Moody & Rob., 100; 5 Bing. N. C., 5 Mees. & Wels., and 2 Ad. & El., as cited *supra*. And see 1 Am. Lead. Cas., 291 et seq. The true principle is, that *the ownership of the money determines the right of application*. While it belongs to the debtor, he may apply it to which debt he pleases. The moment it is paid, without any direction, it becomes the property of the creditor, and he may do with it as he will. Co. Litt., 145 a; *Heyward's Case*, 2 Rep., 36 a; 1 Am. Lead. Cas., 308. Even if the court should take the view that neither party could make the application, but that it is to be done by the court according to equity, there is no case justifying an application other than the one adopted in this case. The note was the oldest debt, evidenced by writing, already due and drawing interest at seven per cent.; and the payments should be applied to it under any rule.

COLE, J. The doctrine in regard to the appropriation of payments, as generally stated in the books, is this: Where the debtor makes any payment to the creditor holding different demands against him, he has the right to apply it to what debt he pleases. If the debtor makes no specific appropriation, the creditor may apply the money as he pleases. And when neither party appropriates the payment, the law will apply it according to its own notion of the intrinsic equity and justice of the case. These rules obviously presuppose a payment made by the debtor to the creditor where the former has the power of exercising an election as to its appropriation. If the debtor neglects to exercise an option either at the time

Jones and another, Adm'rs, vs. Williams.

of payment or before the creditor exercises his right, then the act of appropriation devolves upon the latter.

In the case at bar, the circuit court assumed that payments were made which came within the application of these rules of law. The jury were instructed, that if they found the fact to be that the deceased was at work as a servant of the defendant and entitled to wages, and that at the time he commenced laboring, and during the time he was at work, he held a promissory note against the defendant, then any payments made while he held the note and performed the labor might and should be applied on the note, unless they found that the defendant elected, as payments were made, to apply them in payment of services, or that the deceased then, or in his lifetime, made an election to apply the payments upon his claim for services, if he had such a claim. It appeared from the evidence that the deceased had charge of the mill, and that from time to time he drew out money and charged it to himself in the day book which was kept at the mill. These several sums of money thus drawn out by the deceased and charged to himself, were treated by the court as payments made by the defendant where the latter could exercise the right of appropriation. It seems to us that this is a mistaken view of these transactions. These were not payments in the proper sense of the word; and it is obvious from the nature of the case that the defendant had not the power to control the application of the moneys, as he would have where payments are made. Doubtless the defendant knew of the existence of this running account, and that the deceased, Griffiths, was drawing out money which he charged to himself in the account. But there was no direction on his part that these sums should be treated as payments, nor is there any evidence that Griffiths so regarded them. Under these circumstances, the counsel for the defendant insists, and with great reason, that the most that can be said in respect to the moneys thus taken and charged in the account is, that they

Jones and another, Adm'rs, vs. Williams.

were in the nature of cross demands or setoffs, and did not amount to payments where the defendant could make an appropriation, or where the principles of the application of payments apply. Prof. Parsons lays down the rule on this subject as follows: "In general," he says, "the creditor's right of appropriation, springing from the neglect or refusal of the debtor to make such appropriation, exists only where the debtor has in fact an opportunity of making it, and not where the payment was made on his account by another, or in any way which prevents or impedes his exercise of the right of election." 2 Parsons on Con., 631. And *Waller v. Lacy*, 1 Man. & G., 54, is referred to in support of the doctrine of the text. That was the case of an attorney having several demands against his clients, some of which were barred by the statute of limitations, and some not, and who had received from a third person a sum of money on behalf of his client, which he claimed the right to apply to the payment of the earliest items in his account against his client. But says TINDAL, C. J., inasmuch as the client "never had the power of exercising any election as to the application of this sum, the right of the plaintiff to appropriate it never arose." BOSANQUET, J., observes: "The doctrine of appropriation cannot apply to the present case, where money has come to the plaintiff's hands, not by the act of the defendant, but by the act of a third party." The other two judges are equally clear and emphatic in laying down the doctrine that the right to appropriate only applies where payments have been made by debtors to creditors, and where the former have an opportunity of directing the application. The creditor's right of appropriation springs from the failure or neglect of the debtor to exercise his right to make the application when he has the power to make it. This is obviously the reason and philosophy of the rules in regard to the application of payments.

The undisputed facts of this case take it out of the application of these rules. The moneys drawn out by the deceased,

Moe vs. Moe. (Three Appeals.)

and charged to himself on the account book at the mill, were not payments made by the defendant. There is no evidence whatever that either party so regarded them. They were strictly cross demands or matters of setoff, which would be applied on settlement of the accounts between the parties, but do not fall within the rules of the application of payments. Nor do we think the facts bring the case within the rule in regard to an open current account which is applied in the cases cited in the note to *Mayor, etc., v. Patten* and *Field v. Holland*, 1 Am. Lead. Cas., p. 306. For, not only is it inaccurate to treat the sums drawn out by Griffiths as payments made by the defendant, but there does not appear ever to have been any settlement of these accounts or balance struck by the parties. So that, in whatever view the case is considered, it seems to us the circuit court was wrong in holding that the law in regard to the appropriation of payments applied to and governed the case.

By the Court.—The judgment of the circuit court is reversed, and a new trial ordered.

MOE VS. MOE. (Three Appeals.)

CHANGE OF VENUE: STAY OF PROCEEDINGS: APPEAL: DIVORCE: TEMPORARY ALIMONY. (1) *Right of defendant in divorce to have venue changed to his county, even when it must afterwards be removed thence.* (3) *Demand of such change does not stay proceedings.* (2) *Double appeal for same relief.* (4) *Record on appeal from order for temporary alimony.* (5) *Power of court to which the cause is removed, over previous allowances for temporary alimony, etc.*

1. In a divorce suit not commenced in the county of defendant's residence, he is entitled to have the venue changed to that county, notwithstanding plaintiff's affidavit that the circuit judge thereof is prejudiced against her; although, upon renewal of such affidavit after the change of venue, she may be entitled to have the cause sent out of that circuit for trial.

Moe vs. Moe. (Three Appeals.)

2. Where the same motion, on the same ground, is made and denied twice in the same action, and both orders appealed from, the relief sought being obtained on the first appeal, the second is dismissed.
3. Where the summons is served on the defendant in his own county, his demand that the venue be changed to that county (under sec. 4, ch. 123, R. S.) does not operate as a stay of proceedings; and the court in which the action is, has authority, pending the motion for the change of venue, to order payment of temporary alimony and suit money. *Bonnell v. Gray*, 36 Wis., 574, followed.
4. Where an answer was served after the motion for temporary alimony, etc., was made, and before it was determined, but was not filed until after its determination, and was not before the court on the hearing of the motion, this court must affirm the order granting such alimony if justified by the facts stated in the petition.
5. But the proper circuit court can modify said order on defendant's application, and may in its discretion allow, on the attorney's fees therein directed to be paid, any attorney's fees which shall be paid by the defendant on these appeals.

APPEALS from the Circuit Court for *Milwaukee* County.

Appeals from three orders made in the progress of the cause. The action is for a divorce, and was commenced in the circuit court for Milwaukee county. The summons and complaint were served on the defendant in Portage county, March 8, 1875. It is undisputed that the defendant was then, and for many years had been, a resident of the latter county. On the 13th of the same month, defendant served upon plaintiff's attorney an affidavit of such residence, together with a notice of motion to be made to the court on a day therein specified for an order changing the place of trial of the action to Portage county, unless plaintiff should sooner consent to said change. Plaintiff not consenting thereto, the motion was argued, and was denied by an order bearing date, May 17, 1875. On the argument, an affidavit of the plaintiff was read in opposition to the motion, to the effect that the judge of the judicial circuit which includes Portage county is prejudiced against the plaintiff. The first appeal is from the order of May 17th.

Moe vs. Moe. (Three Appeals.)

The motion for a change of the place of trial, for the same cause, was renewed, and, by an order dated May 26, 1875, was again denied. The second appeal is from this order.

With the summons and complaint a petition of the plaintiff for temporary alimony and suit money, and an order to show cause why an allowance therefor, to be paid by the defendant, should not be made, was served upon the defendant. The petition alleges that the plaintiff is wholly destitute of the means of support, and, upon information and belief, that the defendant has property of the value of over \$20,000, and that his annual income is over \$3,000. The motion, or order to show cause, was undefended, and the court made an order founded thereon, dated April 20, 1875, requiring the defendant to pay to the plaintiff's attorney \$100 for attorney fees, and also to pay to her or her attorney five dollars per week during the pendency of the action. The third appeal is from the order of April 20th.

The cause was submitted on briefs.

D. Lloyd Jones and *Butler, Davis & Flanders*, for the appellant, contended that a demand in writing for a change of the venue to defendant's county having been made in due form before the time for answering expired (Tay. Stats., 1423, § 4), and proof of such demand having been filed in the office of the clerk of the circuit court for Milwaukee county, the latter court had no other jurisdiction than to make an order transmitting the papers in the cause to the proper county; and that the order granting alimony was therefore void. 2. That unless the summons and complaint were served on the defendant in Portage county, the demand itself stayed all proceedings; and there is no record proof as to where the summons and complaint were served. Tay. Stats., 1423, § 5. 3. That the order granting alimony should be reversed for the further reasons that it was made in the absence of the defendant and his counsel, and not upon the day named in the order to show cause why alimony should be granted; and that

Moe vs. Moe. (Three Appeals.)

the answer alleged facts showing that plaintiff was not entitled to alimony.

J. V. V. Platto, for respondent, argued that as the object sought by the two appeals from the two orders refusing to change the place of trial could have been accomplished by one appeal, the second appeal must be dismissed. *Young v. Groner*, 22 Wis., 205; *Meud v. Walker*, 20 id., 518. 2. The defendant did not entitle himself to a change of venue on the ground that the action had not been commenced in the proper county, because no proper *demand* in writing was made before the time for answering expired (Tay. Stats., 1423, § 4), but a *motion* was made in the first instance. The *consent* of the plaintiff must first be sought in such cases; if that is not obtainable, an order of the court may then be sought. "The object of the demand is to allow the plaintiff an opportunity of voluntarily correcting the error without the expense of a motion." *Vt. R. R. Co. v. Northern R. R. Co.*, 6 How. Pr., 106; *Houck v. Lasher*, 17 id., 520; *Pereles v. Albert*, 12 Wis., 666; *Foster v. Bacon*, 9 id., 345, 347; *State v. McArthur*, 13 id., 407-8; *Lane v. Burdick*, 17 id., 92, 95; 2 Wait's Pr., 628 b, 629 a; 1 Till. & Shearm. Pr., 528-30; 1 Whittaker's Pr. (3d ed.), 664; 2 id., 1019; 2 Abb. Pr. & Pl., 243, note (a), and 246. 3. By admitting "due service" of notice of trial and giving a cross notice, defendant waived his right to a change of venue. *Struver v. Ocean Ins. Co.*, 9 Abb. Pr., 23, 27; *Talman v. Barnes*, 12 Wend., 227. 4. The affidavit used in plaintiff's behalf at the hearing, showing that the circuit judge of Portage county was prejudiced against her, was a sufficient ground for denying the motion. *Bonnell v. Esterly*, 30 Wis., 549; *Goodno v. Oshkosh*, 31 id., 127. 5. The appeal from the order denying a change of venue was no ground for refusing suit money and alimony *pendente lite*. 5 Wait's Pr., 736; *Robertson v. Robertson*, 1 Edw., 360; *Wood v. Wood*, 7 Lans., 204. 6. The statements of the answer, being contradicted by those of the plaintiff's petition,

Moe vs. Moe. (Three Appeals.)

cannot be taken as true against her; and she is entitled to the means of support and of carrying on the suit pending the trial and determination of the issues of fact.

LYON, J. I. The first motion for a change of the place of trial to Portage county should have been granted. The notice of motion contained a good demand for such change under the statute (R. S., ch. 123, sec. 4), and the affidavit of the plaintiff that the judge of the seventh circuit is prejudiced against her, is not sufficient to defeat the motion. Such affidavit may show that the action should not be tried in that circuit; and if it be renewed when the cause is sent to Portage county, the circuit judge will doubtless send the cause out of his circuit; but it does not show that the trial ought to be had in Milwaukee county. In that respect it is quite unlike the case of *Couillard v. Johnson*, 24 Wis., 533, where it was made to appear that the action ought to be tried in the county in which it was commenced. We hold that in this and similar cases, an affidavit of the prejudice of the judge of the circuit court for the county in which the defendant resides, is not, of itself, sufficient ground for denying a motion to change the place of trial to that county. The order of May 17, 1875, denying the plaintiff's motion to change the place of trial to Portage county, must be reversed, and the cause remanded with directions to the circuit court to grant such motion. The defendant must pay the costs of the appeal from the order of May 17; but no attorney's fees shall be taxed therein against him.

II. The defendant having obtained by his first appeal all that he seeks to obtain by his appeal from the order of May 26, the latter appeal is superfluous, and must be dismissed. *Young v. Groner*, 26 Wis., 205.

III. The demand that the place of trial be changed to Portage county was made under sec. 4, ch. 123, R. S., and did not operate as a stay of proceedings, as it would have done had

Likens vs. McCormick and another.

the summons been served in any other than Portage county. Laws of 1869, ch. 185 (Tay. Stats., 1423, § 5). No order was made staying proceedings in the action pending the motion. Under these circumstances it must be held, on the authority of *Bonnell v. Gray*, 36 Wis., 574, that pending such motion the court had jurisdiction of the action, and authority to make the order for the payment of temporary alimony and suit money. In making that order the court had before it only the complaint and petition. True, the answer had been served when the motion was determined and the order made; but it was not filed until June 4th, and was not before the court on the hearing of the motion.

Taking the facts stated in the petition as true, the allowance does not seem excessive. We must therefore affirm the order of April 20th. But the whole matter is under the control of the proper circuit court; the defendant is at liberty to apply to that court for a modification of the order; and the court may in its discretion allow, on the attorney's fees therein directed to be paid, any attorney's fees which shall be taxed against and paid by the defendant, on these appeals.

By the Court.—Order of March 17th reversed; that of April 20th, affirmed; and the appeal from the order of May 26th, dismissed.

LIKENS vs. McCORMICK and another.

PRACTICE: OPENING JUDGMENT: SERVICE BY PUBLICATION. (1) *Defect of jurisdiction waived by neglect of defendants to appeal from order to answer on vacating judgment.* (2) *Statute authorizing service by publication must be strictly followed.* (3) *When service by mailing summons and complaint invalid.* (4) *When personal service on one of two defendants without the state insufficient.* (5) *Defendants irregularly served may have default opened.*

1. Defendants, appearing for that purpose only, moved to vacate a judgment

Likens vs. McCormick and another.

against them, on the ground that the court had not acquired jurisdiction of them. An order was thereupon made vacating the judgment, but setting a time for them to answer; and from this they took no appeal. *Held*, on plaintiff's appeal, that by such submission to the order, defendants waived the defect of jurisdiction; and the question presented here is not that of jurisdiction, but only whether the judgment was properly opened for irregularity.

2. Courts of record of this state, in actions upon contract, may obtain jurisdiction of a nonresident defendant, having property in this state, by service of summons by publication; but the statute providing for such service (R. S., ch. 124, sec. 10) must be strictly followed.
3. After the order of publication in this case, a copy of summons and complaint was mailed to defendants, by their firm name, giving the initials only of their Christian names, which were known to the plaintiff. *Held*,
(1) That if a copy had been so directed and mailed to *each* of them, it would have been a doubtful service. *Kellam v. Toms*, 38 Wis., 592.
(2) That the mailing of one copy to both could operate, at best, as service on one only, not affecting the other; and the uncertainty which, if either, might receive the copy so mailed, makes it *prima facie* void as to both.
4. A subsequent personal service on one of the defendants, without this state, with no attempt to serve the other, was not a sufficient compliance with the statute.
5. Judgment as upon default having been rendered against the defendants after the attempts at service above described, they were entitled to have it opened, for the irregularity.

APPEAL from the Circuit Court for Iowa County.

Action to recover a balance alleged to be due upon an open account from the defendants, *C. H. and L. J. McCormick*, residents of Illinois, to the plaintiff, who is a resident of this state. Service was attempted to be had upon defendants by publication, the facts concerning which appear in the opinion. Plaintiff having taken judgment by default, defendants subsequently appeared by attorney for the sole purpose of moving, upon affidavits and the papers on file, to set the judgment aside. The court made an order setting aside the judgment, and granting defendants leave to answer within thirty days. Plaintiff appealed from the entire order; but defendants did not appeal.

Likens vs. McCormick and another.

W. W. Likens, appellant, in person, argued that the summons was regularly served, all the provisions of the statute having been fully complied with. Tay. Stats., ch. 124, § 12. Even if there were defects in the service, defendants waived them by their appearance. The appearance was general. 14 Wis., 222; 17 id., 401; 32 id., 312; 4 id., 275; 11 id., 81; 26 id., 220; 27 id., 488, 564; C. C. Rules, 22; 15 How. Pr., 92; 9 id., 445; 19 id., 429; 32 id., 351; 6 Abb. Pr., 336; 3 Caines, 133; 1 Wend., 1; 2 Duer, 648; 48 Barb., 132; 1 Wait's Pr., 560. Such an appearance waives all irregularities in the summons and its service, and even the want of any service. 39 Barb., 140; 6 How. Pr., 308, 439; 5 id., 233; 10 N. Y. Leg. Obs., 158; Gra. Pr., 87, 123, 566-7; 7 Cow., 366; 18 Wis., 69; 26 id., 220.

Moses M. Strong, for respondents, contended that neither of the defendants had been served with process, and that the judgment set aside was void for want of jurisdiction over them. *Weatherbee v. Weatherbee*, 20 Wis., 499.

RYAN, C. J. The respondents appeared below specially for the purpose only of moving to vacate the judgment, evidently on the ground that the court had not acquired jurisdiction over them. The peculiarity of the case is, that, on this motion, the court below not only vacated the judgment, but set a time for the respondents to answer, and ordered the costs to abide the event of the cause; presumably assuming jurisdiction, and proceeding on the ground of irregularity. The respondents have not appealed from this part of the order, and must be taken as submitting to it. We think that the order, so submitted to, operates to cure all defect of jurisdiction. *Ruthe v. R. R. Co.*, 37 Wis., 344, and cases in this court collected by DIXON, C. J., in a note to *Heidenheim v. Sprague*, 5 Wis., 259. Had the waiver of the jurisdictional defect been by voluntary appearance of the respondents, the question here would have been different. But the waiver rests

Likens vs. McCormick and another.

solely on their submission to the order appealed. The appeal is from the whole order, and if it were reversed, it would leave the court below without jurisdiction. *Anderson v. Coburn*, 27 Wis., 558, and other cases in this court. The question for us is therefore one of regularity, not of jurisdiction.

The appellant's affidavit on which the order of publication was made, gives the full Christian and surnames of the respondents, and states that they reside in Chicago. After the order of publication, a copy of the summons and complaint was mailed, directed to the respondents by the name of their firm as stated in the affidavit, giving the initials only of their Christian names. If copies had been separately so directed and mailed to each, it would have been a doubtful service. *Kellam v. Toms*, 38 Wis., 592. But the mailing of one copy to both could operate at best as service upon one only, not affecting the other. *Blackburn v. Sweet*, 38 Wis., 578. And the uncertainty which respondent, if either, might receive a copy so mailed to both, makes it *prima facie* void as to both. Afterwards there was personal service on one of the respondents in Chicago, but no apparent attempt to serve the other. So that there is a manifest failure to follow the statute. This mode of service has been sustained by this court. *Jarvis v. Barrett*, 14 Wis., 591. But the statute must be strictly followed. *Anderson v. Coburn*, *supra*. The judgment was clearly irregular, in a point affecting the substantial rights of the respondents, and they were entitled to have it opened.

By the Court. — The order of the court below is affirmed.

Sobey and others vs. Thomas and another.

SOBEY and others vs. THOMAS and another.

EVIDENCE. (1) *Rule as to positive and negative evidence, when inapplicable.*

MINING LEASES. (2, 3) *Lease of exclusive right to work a certain range, construed.* (4) *Mining statutes construed, and held inapplicable where rights are defined by contract.*

1. The rule in respect to the relative value of positive and negative testimony is inapplicable to the case where one party to a verbal lease testifies that it did, and the other that it did not, contain a certain grant.
2. A mining lease of an exclusive right to mine upon the "Watkins range or works" on the lessor's land, *held* to convey a right not only to mine on the said range as far as it had been actually opened and worked, but also to follow it to the limits of said land.
3. Such lease, however, did not convey the exclusive right to work a vein on another portion of said tract, between which and the former no connection exists *within the said tract*, although, since the lease, a connection between them has been traced, by a circuitous course, through adjoining land of another person; and this conclusion is not affected by the fact that the ores in the "Watkins range" are in a horizontal seam.
4. The statutes governing the rights of miners (ch. 260 of 1860, and ch. 117 of 1872) apply only where there is no contract fixing the rights of the parties; and sec. 3 of the earlier act (as amended by sec. 2 of the later) gives the lessees in this case no right not included in their lease as here construed.

APPEAL from the Circuit Court for Iowa County.

Action to restrain defendants from digging and mining on premises described in the complaint. The complaint alleged, in substance, that N. W. Dean was the owner of a certain quarter-quarter section of land, on which there was a valuable range of lead and zinc ores, known as the Watkins range; that Dean, by his agent Reese, had granted to the assignors of the plaintiffs an oral lease "to mine and dig for lead and zinc ore, according to mining usages, upon any and every part of so much of the said quarter-quarter section as lies north of a line running east and west across the same so far south as to embrace the said Watkins range;" that while plaintiffs were in peaceable possession of said premises, defendants had entered

Sobey and others vs. Thomas and another.

and commenced mining thereon, and were continuing to dig and carry away ores therefrom, which ores formed a part of the range worked by plaintiffs. The answer, in substance, denied that plaintiffs, by their lease, had the exclusive right to mine upon said land or any part thereof, outside of the said Watkins range proper; denied that the "discovery made by the defendants, or the ores therein contained, are or is connected with the range of the plaintiffs;" admitted that defendants were mining upon the quarter-quarter section described in the complaint; but alleged that they had made an entirely new and independent discovery, etc.

The evidence as to the terms of the lease to the assignors of the plaintiffs was conflicting, William Owens testifying that Reese leased Watkins' range and also that portion north of the range as far north as Evan Williams' land; while Reese testified that he only leased Watkins' range, and that nothing was said about the land north to the line. It appeared that the quarter-quarter section described in the complaint was bounded on the east by the land of Hugh Jones, and on the north by the land of Evan Williams; that the Watkins range had been abandoned and unworked for many years up to the time of the lease by Reese; that striking the west line of the forty acre tract a little north of the middle thereof, it extended across the tract in a southeasterly direction, and had formerly been worked to within about 300 feet of the east line; that it was a "flat opening," that is, the seam containing the ores was nearly horizontal, and its width unascertained, varying from a few feet in some places to several hundred in others; that the location of defendants' shaft was upon and near the northeast corner of the forty-acre tract, and about forty-nine rods north of the point at which the range was supposed to cross the east line of the forty; that shafts had been sunk and ores found and worked to a considerable extent on the land of Hugh Jones, extending in a northeasterly, and thence in a northwesterly direction, and towards the shafts of the defend-

Sobey and others vs. Thomas and another.

ants. Much testimony was introduced upon the question whether the defendants' diggings were connected with and a part of the Watkins range, and the evidence upon this issue was conflicting.

The court submitted to the jury the following questions: 1. "Is the point of land at which the defendants were working, as described in the complaint, included within the terms of the lease made by N. W. Dean by his agent Reese, to the assignors of the plaintiffs, or to the plaintiffs themselves, independent of the question whether it is the same range as that known as the Watkins range?" 2. "Is the range of ores at the point of land at which the defendants were working, as described in the complaint, the same range of ores leased to the assignors of the plaintiffs, known as the Watkins range?"

It was admitted in open court that when the lease was made by Reese, the range on Dean's land was not worked by any one, and that Dean was the only person having any title thereto; and that before that time, the range on Hugh Jones' land, which the plaintiffs claim to be a continuation of the Watkins range, was discovered by miners, and that the same was worked upon by Jones or his lessees before, at and since the time of Reese's lease to the plaintiffs. Thereupon the court also submitted to the jury the following question: 3. "The foregoing facts being admitted, does the lease of the Watkins range to the plaintiffs entitle them to the diggings and mineral struck by the defendants?"

The jury answered the second question affirmatively, and the other two negatively. The judge adopted these answers in his findings of fact; and held, that the discovery of the range or vein of ore on Jones' land, made while the Watkins range was abandoned and unworked, was, as against any miner, subsequently on the old Watkins range, a prior discovery of that vein, and entitled the discoverers to follow the vein to the limits of the land on which such discovery was made, unless

Sobey and others vs. Thomas and another.

restricted by some contract with the owner of the land; that such discovery "cut off the Watkins range and terminated the rights of any subsequent lessees of that range;" and that, in the absence of any proof of a mining custom to the contrary, a lease of the Watkins range, without a special provision for that purpose, did not confer on the lessees the right to mine upon such vein in case it should be found to run back upon the Dean land.

Judgment for the defendants; from which plaintiffs appealed.

Moses M. Strong and *M. M. Cothren*, for appellants, reviewed the testimony at length, and contended that the lease covered all that part of the forty north of the Watkins range, and that so far as the testimony of William Owens on that subject was in conflict with that of Reese, it was subject to the rule as to positive and negative testimony (*Ralph v. C. & N. W. Ry Co.*, 32 Wis., 177); and that the point at which defendants were mining was in the Watkins range, and the ores dug by them pertained to and formed a part thereof. They also criticised the theory of the circuit judge that the plaintiffs' rights had been restricted by a prior discovery on Jones' land, arguing, 1. That though the statute (sec. 3, ch. 260 of 1862, amended by sec. 2, ch. 117 of 1870) does not in terms restrict the right of a discoverer there provided for to the land owned by his landlord on whose premises the discovery is made, yet this restriction is necessarily implied, since an attempt to confer by statute such a right within the land of another owner would be invalid. 2. That no such right could be claimed here, founded upon mining usage or custom. There is no proof in the case of any such usage or custom. The court will not take judicial notice of a local custom or usage. It must be proven to have existed from time immemorial; to have continued without interruption; to have been peaceably acquiesced in; and to be reasonable, certain and consistent with law and the constitution. 1 Black. Com., 76-78; Greenl. Ev., § 250; 2 Phil.

Sobey and others vs. Thomas and another.

Ev., 728; *Power v. Kane*, 5 Wis., 265; *Hall v. Storrs*, 7 id., 253.

Wm. E. Carter, for respondents, contended upon the evidence that there was no established connection in fact between the vein worked by plaintiffs and that worked by defendants; that no part of the Dean forty was leased to plaintiffs' assignors except the "Watkins range or works;" and that both the lessor and lessees understood by this description that part of the vein on which Watkins & Co. had worked, and did not intend to include any part of the vein outside of the limits of those workings. However the fact might be as to the latter point, counsel insisted: 1. That the law of the case was correctly stated by the circuit court; that if the Dean forty and the Hugh Jones forty adjoining it on the east had both been owned by the same person, the discovery of the vein on the latter forty while the Watkins range or works were abandoned, and the absolute property of the landlord, such discovery being under a license from the landlord, it would have been, as between the discoverer and the landlord, a *new* discovery, and would entitle the discoverer (in the absence of any contract restricting his rights) to all the ores pertaining to the vein, under ch. 260 of 1860 as amended by ch. 117 of 1872; that the only effect of the several ownership of the two forties upon this result was to limit the rights of the new discoverer to that part of the vein which was within the Hugh Jones forty, and prevent his pursuing the vein over on to the Dean forty without Mr. Dean's license; but that the discovery was none the less a prior discovery, and barred a subsequent lessee from Dean of the old Watkins works or range from following the vein into, through or beyond such discovery. 2. That, independently of the question of *prior* discovery, when one discovers a vein or range of ores in pursuance of the statute, or purchases or leases such a vein or discovery, from the discoverer or the landlord, and pursues his vein to the limits of the land on which he has permission to mine, if such vein or

Sobey and others vs. Thomas and another.

range passes entirely off such land into the land of another owner, where he has no permission to follow, he has no claim beyond that point. He can claim only ores which are directly connected with the discovery without break or gap. Any other view would lead to absurd consequences; since the question whether the same vein returns to his landlord's tract of land at some remote spot, after passing through the land of others, can never be decided except at the sovereign pleasure of those other land owners. 3. If, as is claimed by plaintiffs, it was intended by the parties to the lease to give the lessees a right to mine at the place where defendants' mine is, it was a grant of something separate and distinct from the Watkins range, works or mine. But it is clear that such a grant of a mine, opened or unopened, distinct, separate and entirely cut off from the Watkins mine, would have been, at least until possession of it was taken, a mere license, and revocable at pleasure by the landlord. 2 Rolle, 152; 2 Chand., 117; 29 Wis., 511; *Clute v. Carr*, 20 id. 531; *Hanley v. Wood*, 2 B. & A., 724; 4 East, 460; 1 Smith, 278; 4 M. & W., 538; *Wood v. Ledbitter*, 13 id., 838; 22 Wis., 550; 1 Washb. R. P., 543; Angell on W. C., §§ 286, 287, 293, 295. Again, if the defendants' mine was intended to be *included in the lease*, it was a lease of an unopened mine, and would not pass to the lessees the right to open this mine. *Astry v. Ballard*, 2 Mod., 193; 1 Saund., 323; 2 id., 259; 1 Washb. R. P., 412. A license to mine in another's land does not confer an exclusive right of property in the ores found therein. *Upton v. Brazier*, 17 Iowa, 153; 19 Ind., 14; 1 Washb. R. P., 549; 2 Am. Lead. Cas., 682; *Hanley v. Wood*, 2 B. & A., 724. The act of 1860 cannot help the plaintiffs, for the reason that they have never made or "struck" any discovery or prospect, as well as for the reason that if their diggings on the Watkins range were a "discovery," the ores at defendants' mine would not "pertain" to such discovery. If the so-called "lease" from Reese was a license only, it conveyed no interest in the lands,

 Sobey and others vs. Thomas and another.

and was revocable at pleasure. 1 Washb. R. P., 543; 34 N. Y., 20; 3 Vroom, 225; *French v. Owen*, 2 Wis., 250; *Wood v. Ledbitter*, 12 M. & W., 838. An interest in lands could only be created by deed, unless it was a lease for a term not exceeding one year. Sec. 6, ch. 106, R. S. But the term "lease," there used, does not include grants of or rights to mines. They are incorporeal hereditaments. They are really a sale of a portion of the land. *Gowan v. Christie*, L. R., 2 Scotch Appeals, 282; *S. C.*, 5 Eng. R., 123; *Stoughton v. Leigh*, 1 Taunt., 402; *Merritt v. Judd*, 14 Cal., 64; *Watts v. White*, 13 id., 321; *McCarron v. McConnell*, 7 id., 152; 31 Pa. St., 478; 53 id., 287; 35 id., 292; 38 Mo., 588; *Wilkinson v. Proud*, 11 M. & W., 33; *Gillett v. Treganza*, 6 Wis., 344; 2 Washb. R. P., 347; Bainbridge on Mines, 117, 261. Such an interest in lands cannot be created by parol; and an attempt to so create it amounts to a mere license, revocable at pleasure. *Duinneen v. Rich*, 22 Wis., 550; Bainbridge on Mines, 117; Angell on W. C., §§ 168-173, 295, 296; 2 Washb. R. P., 347; *Wood v. Ledbitter*, *supra*; *Ruffey v. Henderson*, 16 Jur., 84; *Adams v. Andrews*, 15 Q. B., 284; *Williams v. Morris*, 8 M. & W., 488; 2 Sug. on Vend. & Pur., 100; *Babcock v. Sutter*, 1 Keyes, 397; *French v. Owen*, 2 Wis., 250; *Fryer v. Warne*, 29 id., 511; *Clute v. Carr*, 20 id., 531; *Cocker v. Cowper*, 1 Crompt. Mees. & R., 418; *Fentiman v. Smith*, 4 East, 107; *Taplin v. Florence*, 3 Eng. Law & Eq., 520; 1 Gill & Johns., 366; 11 Mass., 533; 15 Wend., 380; 6 Hill, 61; 17 Conn., 402; 13 Vt., 150; 4 Sandf. Ch., 72; 9 Johns., 35; 18 Barb., 347; 5 id., 379, 550; 10 id., 333; 3 Duer, 255; 3 Dev. (N. C.), 389; 1 Strob. (S. C.), 36; 11 Ill., 157; 14 id., 464; 4 Foster, 176; 23 Conn., 214; 6 Md., 20; 4 R. I., 47; 25 Conn., 239; 24 Georgia, 179; 47 Pa. St., 329; 38 Mo., 588; 46 N. H., 505; 11 Allen, 141; 54 Mo., 426; 22 Mich., 439; 47 N. H., 383; 15 Gray, 441; 12 Allen, 457; 3 Hurl. & Colt., 256.

Sobey and others vs. Thomas and another.

COLE, J. The material question in this case is: What rights and privileges were embraced in the verbal lease which was made by Reese, the agent of Dean, with the assignors of the plaintiffs? It was alleged in the complaint, and testimony was offered in support of the averment, that the lease gave the plaintiffs the right to mine not only upon what was known as the Watkins range or works, but also upon any and every part of the forty-acre tract north up to Evan Williams' land. But this claim was distinctly negatived by the verdict of the jury and the finding of the circuit court; and we are entirely satisfied that it cannot be maintained upon the evidence. The question as to the extent of the rights granted by the lease must be mainly determined upon the testimony of the witnesses Reese and William Owens. The former clearly and positively states that it was only the Watkins works or range which was leased; and his testimony is corroborated by some facts which appear in the testimony of other witnesses. But were it otherwise, we should consider his unsupported statements in respect to the lease as more reliable and entitled to greater credit than the statements of William Owens, who is certainly not so intelligent a witness, and who would be more likely to be mistaken upon the terms of the lease. The learned counsel for the plaintiffs insists that, giving due weight to positive as against negative testimony, it is satisfactorily shown that the lease embraced all of the tract north of the Watkins range, as well as that range proper. But we do not understand that the rule in respect to the effect of positive as against negative testimony applies. The statements of both witnesses are positive in their character; the one that the lease only included what was known as the Watkins work or range, and nothing more; the other that it embraced that range, whatever it might be, and all the rest of the land up to Williams' land. Both witnesses testify as to facts, or in other words as to the real terms of a verbal contract entered into between them. So that we cannot perceive how the doctrine of *Ralph v. The*

Sobey and others vs. Thomas and another.

Chicago & Northwestern R'y Co., 32 Wis., 178, can have any application.

Independent of the question, then, whether the mine or diggings of the defendants were actually upon the Watkins range, it seems to us it is quite impossible to maintain the position, upon the proofs in the case, that the ground which was being worked by them was originally included in the lease, because no right was given to mine on any land distinct from and separate from that range. This is a fact which we consider to be fully and clearly established by the evidence. We shall enter upon no further examination of the testimony bearing upon the question, but state the conclusion which we have reached in reference to it.

This leads to the inquiry as to what was included in the Watkins range or works, which, it is admitted, were leased to the assignors of the plaintiffs, and upon which their right to mine was exclusive. On that question our opinion is, that the lease of the Watkins range carried with it, or included, the right to take out and appropriate, on the payment of the stipulated rent, all the ores and minerals which might be found in the old works, and also the minerals which should be found in the unbroken ground between the easterly point of the old works and the east line of the tract. We think that this was the extent of the privileges and rights granted by the lease, and that when the east line was reached in following the Watkins range, the plaintiffs' rights terminated. In view of the circumstances surrounding the transaction, it is unreasonable to suppose that any further rights were intended to be granted or secured by the lease. The counsel for the defendants suggests, rather than argues, that the lease only gave the plaintiffs the right to mine on the old Watkins range to the extent to which it had actually been opened and worked, and that it did not confer the right to follow the range to the east line of the forty. But we are unable to adopt that view of the case. We think nothing less than the right to work and prove the Wat-

Sobey and others vs. Thomas and another.

kins range to the east line of the tract was intended to be granted; and we have little doubt upon the evidence that this was the real understanding of the parties when the verbal lease was entered into.

Nor can we perceive that the plaintiffs' case derives any aid from the statutes regulating the rights of miners (ch. 260, Laws of 1860, and ch. 117, Laws of 1872). These enactments lay down certain rules and regulations which govern mining contracts and leases, when not contrary to the terms established by the landlord, and in the absence of any express agreement fixing the rights of parties. It is unnecessary to dwell upon the various provisions of these acts. The third section, in effect, provides that the person making a discovery of a crevice or range containing ores or minerals, shall be entitled to the ores or minerals pertaining thereto, subject to the rent of the landlord as well before as after such ores or minerals have been separated from the freehold; and he may recover the ores or minerals, or the value thereof, from any miner digging upon his range with notice of his claim. This provision obviously secures to the discoverer the right to develop the range or crevice to the limits of the land on which he has the privilege to mine, and vests in him the title to whatever ores or minerals he may find therein. But how does the provision strengthen the claim or aid the rights of the plaintiffs upon the facts of this case? It is said that the ores or minerals found at the place where the defendants were at work *pertained* to the Watkins range or works, or, in other words that they were taken from that range. But how is that fact ascertained and determined? By the plaintiffs attempting to trace their range several hundred feet around through the adjoining land of Hugh Jones on the east, thence back on to the land of Mr. Dean. But is it at all probable that the parties intended or supposed, when the lease was entered into, that any such rights were conferred by it? The Watkins range, as then known, had a well defined course in a southeast

direction; and we must presume that the parties knew that fact, and contracted with reference to it. And it is quite incredible that they then understood that the right to work the Watkins range carried with it the right to follow that range to the east line of the forty, and, upon permission being obtained, to trace the range through the adjoining tract; and also the further right to follow the range back onto the north-east corner of the Dean tract. The verbal lease should be read in the light of the surrounding circumstances; and if it is, the claim of the plaintiffs will be found unsupported by all the facts and probabilities of the case. If the plaintiffs, while developing their mine on the Dean land, had actually traced the Watkins range to the point where the defendants were at work, and established the identity of the defendants' diggings with the Watkins range, a different question would be presented. There would then be ground for claiming that the ores and minerals mined by the defendants belonged to the plaintiffs and *pertained* to their range. In this remark, however, we do not wish to be understood either as affirming or disaffirming the correctness of the theory of the circuit court, as stated in the conclusions of law. That theory goes upon the assumption that there was a prior discovery of the range or vein on Jones' land while the Watkins range was abandoned and unworked, which restricted the rights of the plaintiffs. This may be so; still our judgment is not placed upon that ground. We think the lease of the Watkins range only gave the right to mine upon that range to the east line of the tract.

We have not overlooked the fact that the Watkins range was what is described by the witness as a "flat opening," the ores being found in a horizontal instead of vertical seam. The limits or borders of this opening on the north are not known, and have never been traced. Possibly, the opening may extend to and include the vein where the defendants are working. But whether it does or not is doubtful and unde-

Stahl vs. O'Malley and others.

terminated. The plaintiffs do not pretend they have traced the Watkins range by drifting north on the Dean tract up to the defendants' works. They claim that they have established a physical connection between the ores in these works and their own, by following the Watkins range around through the diggings on Jones' land, back again on to Dean's land. But we have already said that the lease of the Watkins range terminated at the east line of the tract, and carried no rights beyond that point.

This is the controlling question in the case, and renders a consideration of the other exceptions unnecessary.

By the Court. — The judgment of the circuit court is affirmed.

STAHL VS. O'MALLEY and others.

TOWN TREASURER: (1) *Bound to execute warrant as received; can not correct errors.* (2) *When liable on his bond.*

PRACTICE. (3) *Cause remanded for new trial when record does not show amount for which judgment should go.*

1. Where the warrant of the town clerk to the town treasurer commanded the latter to pay the county treasurer, as state tax, a certain sum, which appeared to be less than the aggregate of the several items of state tax carried out in the tax roll delivered with the warrant, and to retain, as such town treasurer, a certain sum, less than the aggregate of the several items of town tax in said tax roll, and to pay the balance of tax collected to the county treasurer, it was his duty to *execute the warrant as he received it*, and he had no authority to investigate or correct any errors therein.
2. In an action by the county treasurer on such town treasurer's bond, for failure of the latter to pay over to the former the full amount which he was required to pay by said warrant, as county tax: *Held*, that defendant was liable, although it appeared, and was adjudged by the court, that the amounts of town and state tax named in the warrant were erroneous, and that defendant had paid to plaintiff the whole sum which the warrant should have commanded him to pay.

Stahl vs. O'Malley and others.

8. The record not showing the amount for which defendant is liable, this court, on reversing a judgment in his favor, rendered on a trial without a jury, remands the case for a new trial.

APPEAL from the Circuit Court for *Ashland* County.

This action was brought by *Stahl*, as county treasurer, under sec. 170, ch. 18, R. S., against *O'Malley*, as town treasurer, and the sureties upon his official bond, for his failure to pay over to plaintiff moneys of the county collected by such town treasurer. The court (trying the cause without a jury) found, as facts, that the town clerk had delivered to *O'Malley*, as town treasurer, the tax roll, with warrant annexed, which warrant commanded him to collect the taxes mentioned in the roll, and out of the moneys so collected, after deducting his fees, to pay to the county treasurer the sum of \$647.65, for state tax, and to retain and pay out as town treasurer the sum of \$4,238.32, and to pay the balance to the county treasurer for county purposes; that the amount of tax which had been levied on the taxable property of the town as the sum which the town treasurer should collect and retain, and pay out as town treasurer, was \$5,304.26, exclusive of all taxes for state and county purposes; that the town clerk, in making out the tax roll, by mistake entered an incorrect statement of the several amounts levied upon the town, and of the purposes for which they were levied, and erroneously directed the town treasurer in his warrant to retain and pay out as town treasurer the sum of \$4,238.32, instead of \$5,304.26, the proper sum; that the warrant also directed the town treasurer to pay to the county treasurer the sum of \$647.65 for state tax, when the actual amount of state tax levied upon the town was \$736.90; that the town treasurer collected the sum of \$6,907, over and above his fees, being \$1,602.74 more than the sum of \$5,304.26, which had been levied for town purposes; and that he paid to the county treasurer the sum of \$1,736.90, which included the state tax, leaving in his hands \$5,170.10.

Stahl vs. O'Malley and others.

The court held that, the sum of \$4,238.32 having been inserted in the warrant by mistake, as the sum to be retained for town purposes, the treasurer was not concluded thereby, but was authorized, after paying the county treasurer the state tax, to retain and pay out for town purposes the sum of \$5,304.26.

Judgment for defendants dismissing the action with costs; from which plaintiff appealed.

The cause was submitted on briefs.

J. J. Miles, for appellant:

The statute (Tay. Stats., 421) provides that the town treasurer shall retain in his hands the amount *specified in his warrant* to be paid into the town treasury, together with his fees, and shall pay to the county treasurer the sum *directed by the warrant* to be paid, in the manner required by law. R. S., ch. 18, sec. 59. It is also the duty of the town clerk to calculate and carry out the total amount of all taxes in the tax roll (Tay. Stats., 410; Laws of 1868, ch. 130, sec. 31); and sec. 33 of the act last cited prescribes the form of the warrant. The warrant is a writ or process within the meaning of the constitution, and judicial in its nature. *Sprague v. Birchard*, 1 Wis., 457. The findings, therefore, show a direct violation of duty on the part of the town treasurer. The warrant being regular on its face, the law would have extended to the treasurer, if he had executed it, the same protection that is given to ministerial officers executing judicial process. 1 Wis., 457. The court assumes that the town treasurer has a right to make the computations which the law directs the clerk to make. Counsel for defendants appealed to the equitable powers of the court to compute the amount of the town tax, and to amend the warrant to agree with its computation. But the court disowned the right, and conferred it upon a ministerial officer. Can a ministerial officer set up a mistake of a judicial officer as an excuse for a violation of the plain letter of the law? If the warrant annexed

Stahl vs. O'Malley and others.

to the tax roll can be amended, the amendment should be made by the town clerk. Blackw. T. T. (4th ed.), 395, 397.

Henry N. Setzer, for respondent:

The conclusion of the trial court that the town treasurer was not concluded by the erroneous sum of \$4,238.32, inserted in the warrant by mistake of the town clerk, but that he had the right to retain the larger sum of \$5,304.26, which had been actually levied for town and local purposes, is clearly a proper construction of the law of this state. After paying over the state tax to the county treasurer, the town treasurer must retain in his hands the local taxes levied for the use of the town and for local purposes. *Winchester v. Tozer*, 24 Wis., 312; *Wolff v. Stoddard*, 25 id., 503. He is required to take charge of "all moneys belonging to the town, or which are by law required to be paid in to the town treasury," and to give a bond (different from that here sued on) that he will faithfully account to the *town supervisors* for all moneys which shall come into his hands (R. S., ch. 15, secs. 86, 87); he is liable on this bond for failure to pay over all school moneys levied and collected upon the taxable property of the town (R. S., ch. 23, sec. 95), and also for highway money and poor funds collected and in his hands; and after collecting moneys levied in the town for local taxes, if he had paid them over to the county treasurer without the order of the town or its officers (ch. 15, sec. 87), he would have been liable on his bond to the town supervisors, and the mistake of the town clerk would be no defense. The town clerk cannot have power to deprive the town of funds lawfully levied for local purposes, by entering, either by mistake or fraud, an erroneous amount in the warrant as the sum to be retained by the town treasurer. Such a doctrine would place a town at the mercy of its clerk, and would compel the tax payers of one town to contribute to the county funds far beyond the amounts contributed by other towns.

Stahl vs. O'Malley and others.

RYAN, C. J. The statute makes it the duty of the town clerk to deliver to the town treasurer a copy of the assessment roll of the town, with the several amounts of the several taxes calculated and carried out in separate columns, with the warrant of the town clerk attached thereto, commanding the town treasurer to collect the tax. The warrant specifies the amount of state tax which it commands the town treasurer first to pay to the county treasurer, specifies the amount of town tax which it commands the town treasurer to retain; commands the town treasurer to pay the balance of tax collected to the county treasurer; and commands the town treasurer to make return of the warrant with the tax roll to the county treasurer. Ch. 18, R. S., secs. 60, 61; ch. 130 of 1868, secs. 31, 33.

It appears by the finding of the court below, that there were discrepancies between the warrant proper and the tax roll proper. The several items of state tax carried out in the tax roll, if added together, appeared to exceed the amount of state tax specified in the warrant proper; and the several items of town tax in the tax roll, to exceed the amount of town tax specified in the warrant proper. These discrepancies were apparent, by mere addition of the items in the tax roll, on the face of the warrant.

But the town treasurer had no official knowledge where the mistakes were; whether in the sums specified in the warrant proper, or in the calculation and carrying out of the items of tax in the tax roll. Both formed part of the process which it was his duty to execute, were of equal authority, and equally binding on him. The blunder of the town clerk was apparent, but there was no presumption where he had made it.

It appears by the finding of the court below that the mistakes were in the sums specified in the warrant proper, and not in the items of tax carried out in the tax roll. This was the judicial determination of the court, surely within its authority in a proper case. But the town treasurer as surely had no such authority.

Stahl vs. O'Malley and others.

And yet this is precisely what he undertook to do. His office was purely ministerial. His sole authority was to execute the warrant, just as it was written. He had no jurisdiction to investigate mistakes in it or to correct them. He wholly mistook the nature of his office, its powers and duties, when he assumed to do so. *State v. Winn*, 19 Wis., 304; *State v. Richter*, 37 id., 275.

The warrant, just as written, was his full protection against all such mistakes. *Sprague v. Birchard*, 1 Wis., 457; *McLean v. Cook*, 23 id., 364. And his duty was to execute it as he received it, whether the amounts in one place were too much or in the other too little. For this he was not responsible. *Bullwinkel v. Guttenberg*, 17 Wis., 583. The protection and the duty are correlative: both limited by the letter of the process.

If the town treasurer had discretion to disregard the sums specified in the warrant proper, substituting his additions of the tax roll, he had equal discretion to disregard the items carried out in the tax roll, and reduce them to correspond with the sums specified for state and town tax. The statute entrusts no such discretion to town treasurers. They are not at liberty to look behind their process.

It would be an intolerable evil if ministerial officers could sit judicially on valid process in their hands for execution, and assume authority to correct mistakes which they assume to discover in them. The good order of society requires that they should have no discretion or responsibility, but should obey their process with absolute submission, secure in doing so. And whenever they substitute judicial discretion for ministerial obedience, they mistake their authority and forego their protection. See *State v. Richter*, *supra*.

Whatever in this case might have been the consequence of the town treasurer's obedience to his process, he had nothing to do with it. He was not answerable for the blunder of the town clerk. And the consequences were for the town and the

McWilliams vs. Brookens.

county to meet, not for the town treasurer. He had no duty or discretion outside of his process. And this is a lesson which ministerial officers cannot learn too often or too well.

We must therefore reverse the judgment in favor of the respondent, for plain violation of his ministerial duty. The record does not sufficiently disclose the facts to say what the judgment against the respondent should be. We therefore order a new trial in the court below. *Dupont v. Davis*, 35 Wis., 631.

By the Court. — Judgment reversed.

McWILLIAMS VS. BROOKENS.

LAND CONTRACT. *When vendor excused from tendering deed.*

Where the vendor in a land contract is able, ready and willing, at the proper time, to convey the land, and offers to do so, but the vendee absolutely refuses to receive a deed or pay any part of the purchase money as agreed, the vendor may maintain an action on the contract without having actually made and tendered a deed.

APPEAL from the Circuit Court for *Grant County*.

The complaint alleges, in substance, that on April 7, 1874, the plaintiff owned and possessed certain lands in Grant county, and on that day he made with the defendant a contract in writing for the sale of the land. The contract is recited in full, and is in the form of a bond, the penalty being \$500, and the condition as follows: "The condition of the above bond is such that, whereas, the said *Isaiah McWilliams* has agreed to convey to the said *Jeremiah Brookens*, by a good and sufficient deed of warranty, free from all incumbrances, the following lands [describing them] upon the following terms: *Brookens* to pay the sum of \$4,000 by September 15th next, and \$4,250 on or before five years from September

McWilliams vs. Brookens.

15th next, with ten per cent. interest annually from date. Said *Brookens* shall execute to said *Mc Williams* a mortgage as security on said lands, duly signed and acknowledged by himself and wife; *Brookens* to have possession September 15, 1874," etc. It is further alleged that the plaintiff "has at all times been ready and willing and able to comply in all things with his said contract, and did at the time and manner specified to be done and performed by him in and by the said contract, to wit, on September 15, 1874, offer to deliver to the defendant a good and sufficient deed of all said land so bargained to the defendant, and did offer to deliver possession of said land to defendant, and did then and there demand and offer to receive from the defendant the said first payment of \$4,000, and a mortgage to be executed by the defendant upon said lands for \$4,250, payable at the time and manner specified in said contract to be made by defendant; but that at such time and place the defendant absolutely refused to receive a deed from the plaintiff of such land conveying to defendant a good and perfect title in and to said land, and utterly refused to pay to plaintiff any moneys towards purchasing said land, and to execute to plaintiff said mortgage, and utterly refused to perform each and everything agreed in said written contract to be done and performed by him." Special damage is alleged.

The defendant demurred to the complaint for insufficiency of facts; and appealed from an order overruling the demurrer.

The cause was submitted on briefs.

Geo. C. Hazelton and *Alexander Provis*, for appellant, contended, 1. That by the terms of the bond, the vendee's covenant to pay was dependent upon the vendor's covenant to convey. It is the duty of courts to enforce contracts as the parties have made them, if unexceptionable, and not to make new contracts. *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis., 424, and cases cited; *Heath v. Van Cott*, 9 id., 516. The making of the conveyance was a necessary precedent act

McWilliams vs. Brookens.

to the execution of a mortgage, and this requirement of the bond shows the intention of the parties. *Kellogg v. Nelson*, 5 Wis., 129; *Kingston v. Preston*, 1 Doug., 690; *Powers v. Ware*, 2 Pick., 456; *Barruso v. Madan*, 2 Johns., 148; *Cunningham v. Morrell*, 10 id., 205; *Grant v. Johnson*, 1 Seld., 247; *Van Schaick v. Winne*, 16 Barb., 90. 2. That the complaint should therefore have alleged execution and tender of the deed. *Kellogg v. Nelson*, *supra*; *Bateman v. Johnson*, 10 Wis., 1; *Culver v. Burgher*, 21 Barb., 324; Bingham on Sale of Real Property, 733, 736, 737, 751; *Snow v. Johnson*, 1 Minn., 48; *Glazebrook v. Wordrow*, 8 Term, 365; *Washington v. Ogden*, 1 Black, 456.

Barber & Clementson, for respondent:

1. It was not necessary for the plaintiff to actually execute a deed after his offer and the defendant's refusal to comply with the contract. *Howland v. Leach*, 11 Pick., 155; *Tinney v. Ashley*, 15 id., 552; *Carpenter v. Holcomb*, 105 Mass., 281; *Cobb v. Hall*, 33 Vt., 233; *Bank of Columbia v. Hagner*, 1 Pet., 455; *White v. Mann*, 26 Maine, 361; *Chamberlain v. Black*, 55 id., 87; *Bellinger v. Kitts*, 6 Barb., 273; *Stone v. Sprague*, 20 id., 509; *Henry v. Raiman*, 25 Pa. St., 354; *Wheeler v. Garcia*, 40 N. Y., 584; *Hazard v. Loring*, 10 Cush., 267; *Hanna v. Ratekin*, 43 Ill., 462; *Skinner v. Tinker*, 34 Barb., 333; *Slingerland v. Morse*, 8 Johns., 474; *Barker v. Parkenhorn*, 2 Wash. C. C., 142; *Crist v. Armour*, 34 Barb., 378; *Vaupell v. Woodward*, 2 Sandf. Ch., 143; *Everett v. Salters*, 15 Wend., 474; *Warren v. Mains*, 7 Johns., 476; *Hunter v. Warner*, 1 Wis., 147; *Wright v. Young*, 6 id., 129; 2 Parsons on Con., 677. 2. By the contract, the \$4,000 was to be paid "by" September 15, 1874, which means on or before that date. *Coonley v. Anderson*, 1 Hill, 519. The defendant was to have possession on that day. Delivery of the deed after that time might have been sufficient. The payment might be considered as dependent only on the delivery of possession, which the plaintiff offered to give on that day.

2 Parsons on Con. (5th ed.), 529; *Pains v. Brown*, 37 N. Y., 232; *Bailey v. Clay*, 4 Rand., 346.

COLE, J. The objection taken to the complaint is, that it states no cause of action. It is said that the conditions in the bond or agreement sued upon are concurrent and mutually dependent, and that neither party can maintain an action for the refusal or neglect of the other to perform, without showing performance or its equivalent on his own part; and that therefore the complaint is defective in substance because it does not show that a deed of the lands sold was actually executed in due form by the plaintiff and tendered to the defendant. The question then is, Does the complaint show a sufficient performance of the contract by the plaintiff, or that he was able, ready and willing to perform at the proper time and manner, but was prevented doing so by the act of the defendant?

It is in substance alleged that the plaintiff has at all times been ready, willing and able to comply with his contract, and that he did, on the 15th day of September, 1874, offer to deliver to the defendant a good and sufficient deed of the land sold, and did offer to deliver possession of the premises, and then demanded the first payment of \$4,000; but that the defendant then absolutely refused to receive a deed conveying a perfect title, and refused to pay any money on the purchase. It was doubtless the right of the defendant, under the agreement, to have a deed conveying a good title, before he could be called upon to make the first payment or execute a mortgage. But he did not require the execution and delivery of the conveyance. On the contrary, when the plaintiff offered to deliver to him a proper deed, he absolutely declined to receive it. It would have been a very idle act for the plaintiff, under such circumstances, to actually execute, acknowledge and tender a deed, in view of the peremptory refusal of the defendant to accept it. The law requires the performance

McWilliams vs. Brookens.

of no such useless ceremony in business transactions. Prof. Parsons lays down the rule on this question as follows: "Concurrent promises are those where the acts to be performed are simultaneous, and either party may sue the other for a breach of the contract, on showing, either that he was able, ready and willing to do this act at the proper time and in the proper way, *or* that he was prevented from doing it, or being so ready to do it, by the act or default of the other contracting party." 2 Parsons on Contracts, 677; *Howland v. Leach*, 11 Pick., 151; *Tinney v. Ashley*, 15 id., 546; *Carpenter v. Holcomb*, 105 Mass., 280. Within the doctrine of these cases, if the plaintiff was able, ready and willing to perform the contract on his part when he offered to deliver a sufficient deed, which the defendant refused to receive, this was equivalent to tender of full performance. By the act of the defendant he was relieved from the necessity of actually executing and tendering a deed. "Readiness, within the meaning of the rule, does not require full and complete preparation at the moment when the offer is made." *Carpenter v. Holcomb*, *supra*. The plaintiff was not bound to make out and tender a deed when the defendant had declined to accept it.

There is nothing in the case of *Bateman v. Johnson*, 10 Wis., 1, in conflict with these views. That was an action upon a contract for the sale and conveyance of real estate, brought by the vendee against the vendor. The defense was, that a good and sufficient deed of the premises was tendered the plaintiff before the commencement of the suit, which was refused. This was held to be a complete defense. In other words, it appeared from the answer that there had been no breach of the contract on the part of the vendor.

We think the demurrer in this case was properly overruled, and the order must therefore be affirmed.

By the Court. — Order affirmed.

Perry vs. Williams.

PERRY vs. WILLIAMS.

Rights and liabilities of receptor for property seized on process.

1. The receptor of property seized on process is not liable to the officer for nondelivery of the property to him on demand, unless the officer is liable to some one for his failure to hold or sell the property on his process; and this doctrine is applicable where such property belongs to the receptor.
2. Under circumstances which estop the receptor to deny his liability to the officer for the property covered by the receipt, the officer is liable to account to the creditor for such property.
3. If the receptor conceals from the officer his ownership and suffers the goods to be seized as property of the defendant (thus preventing, perhaps, a levy upon other property), he is *estopped* from claiming the goods as his own when sued on the receipt; but where the receipt does not admit that the defendant in the process is owner of the goods, and the receptor at the time asserts ownership in himself, he is not estopped from setting up such ownership as a bar to an action upon the receipt.

APPEAL from the Circuit Court for *Green Lake County*.

Action upon an instrument in writing signed by the defendant, of which the following is a copy:

"MACKFORD, Sept. 12, 1874. Received of *C. W. Perry*, constable, twenty bushels of timothy seed, the same as taken on an execution in favor of *R. P. Smith*, the same now being on the premises of *Owen Williams*, which I agree to deliver to said *Perry* on demand, and the said seed taken on an execution against *Patrick McGary*." Due demand of the property thus receipted for, made before this action was commenced, and the refusal of the defendant to deliver the same to the plaintiff, are alleged in the complaint and were proved on the trial.

The answer, in addition to a general denial, alleges that defendant was the owner of the seed when such levy was made, and has never parted with his title thereto, and that such instrument was executed at plaintiff's request and for his accomodation, with no waiver of legal rights, but with a claim of ownership in the defendant.

Perry vs. Williams.

The action was commenced before a justice of the peace, and removed to the circuit court by appeal. On the trial in that court, it seems to have been conceded that plaintiff was a constable when the receipt was given, and was then acting under regular and valid process. Defendant offered to prove that when he gave the receipt he was the owner of the seed and then declared his ownership thereof, and that he gave the same at plaintiff's request and for his accomodation, as alleged in the answer. The court rejected the testimony, holding that defendant was estopped by the receipt, and directed a verdict for the plaintiff for the amount of the execution, which was less than the value of the seed. A new trial was denied, and judgment entered upon the verdict; and the defendant appealed.

The cause was submitted on briefs.

Runals & Lane, for appellants:

1. Evidence that the officer was not misled should have been received, as there would be no estoppel in that case. 2 Hill, 219; 5 Denio, 157; 6 N. Y., 236; 7 id., 253, 644; 9 id., 615; 10 id., 402; 16 id., 633; 12 Abb. Pr., N. S., 289; 51 Barb., 208; 34 N. Y., 24; 10 Wis., 443; 12 id., 466; 36 id., 439; 43 N. Y., 283; 42 id., 443; *Dezell v. Odell*, 3 Hill, 215. An estoppel is created only where an act is done with the intent to influence the conduct of another, and has had that effect, and that other has parted with some right upon the faith of that act. *Pickard v. Sears*, 6 Ad. & El., 469. 2. It is held in *Heath v. Keyes*, 35 Wis., 668, and in 27 id., 521, that a receipt given to the officer does not estop the party from showing that the property was exempt and holding it as such.

F. Hamilton, for respondent:

1. There was a valid consideration for the receipt, and it was competent for the officer to take, and for the defendant to give, such an undertaking. *Cornell v. Dakin*, 38 N. Y., 253; *Acker v. Burrall*, 21 Wend., 605; *S. C.*, 23 id., 606

Perry vs. Williams.

2. Defendant was estopped by his receipt from setting up or proving that the property was his own. *Cornell v. Dakin* and *Acker v. Burrall*, *supra*; *Dezell v. Odell*, 3 Hill, 215; *People v. Reeder*, 25 N. Y., 302; *Bursley v. Hamilton*, 15 Pick., 40; *Morrison v. Blodgett*, 8 N. H., 238; *Terry v. Allis*, 20 Wis., 32. 3. No evidence in respect to any alleged fraud on plaintiff's part should have been received, as no fraud is alleged in the answer. The acts relied on as fraudulent should be specifically stated. *Dickerman v. Bowman*, 14 Wis., 388; *Gill v. Rice*, 13 id., 49; *Gregory v. Hart*, 7 id., 532.

LYON, J. *Main v. Bell*, 27 Wis., 517, and *Heath v. Keyes*, 35 id., 668, were actions by a sheriff and constable or village marshal, respectively, against the receiptors of property seized by such officers on attachments or executions. In both cases it appeared that the property was allowed by the receiptors to remain in the hands of the debtors, and was exempt from seizure on such processes; that the exemption was claimed when the seizures were made and receipts given; and that the officers were not liable over to any party interested, on account of such seizures. Under those circumstances it was held that the receiptors were not liable to respond in damages for the nondelivery of the property to the officers. To the same effect is the case of *Connaughton v. Sands*, 32 Wis., 387. See also the cases cited in *Main v. Bell*.

The principle of law upon which these cases were decided, is, that although the receptor agrees, in terms, to deliver the property seized to the officer, yet the obligation to do so is not absolute in all cases and under all circumstances. The officer can enforce the agreement to deliver the property, or recover damages for a breach of it, only when that is necessary to enable him to answer his obligations to some party having an interest in such seizure. If the officer is not liable to any one because of his failure to hold or sell the property

on his process, the receiptor is not liable to the officer for non-delivery thereof to him.

This principle has been applied in many cases where the goods seized and receipted for were not the property of the debtor but of a stranger, and the receiptor has delivered them to the real owner. Judge STORY, in his work on bailments, states the rule and its application to such cases as follows: "If the officer has wrongfully attached the goods of a third person, as the property of the debtor, and has bailed them, the bailee may, by a delivery of them to the true owner, protect himself; for by such redelivery the officer will be discharged from any liability for the goods to the creditor and debtor and the real owner." § 132. To this proposition the learned author cites the following cases: *Learned v. Bryant*, 13 Mass., 224; *Dewey v. Field*, 4 Met., 383; *Fisher v. Bartlett*, 8 Greenl., 122; *Burt v. Perkins*, 9 Gray, 317; to which may be added *Hayes v. Kyle*, 8 Allen, 300; *Shumway v. Carpenter*, 13 id., 68; *Lewis v. Webber*, 116 Mass., 450.

It is quite true that there are cases which seem to hold a contrary doctrine. *Cornell v. Dakin*, 38 N. Y., 253, to which reference is made in *Main v. Bell*, *supra*, is one of these. But the weight of authority seems to support the doctrine laid down by Judge STORY.

We think the same doctrine is applicable where the goods receipted for belong to the receiptor. If, in the present case, the property for which the receipt was given belongs to the defendant, the creditor has no right of action against the officer for failing to sell the same on the execution. Should the creditor sue the officer for neglecting to satisfy the execution out of such property, the latter can defeat the action by showing that the property did not belong to the debtor. *Fisher v. Bartlett*, 8 Greenl., 122; *Fuller v. Holden*, 4 Mass., 498; *Tyler v. Ulmer*, 12 id., 163. Neither has the defendant in the execution any right of action against the officer; for he has not been deprived of his property or in any manner inter-

Perry vs. Williams.

ferred with. There are cases in which, although the property receipted for was exempt from seizure, or belonged to the receiptor or a third person, the receiptor has been held liable on the principle of estoppel. It is believed that those cases were correctly decided, and that they are not exceptions to the general rule above stated. If the circumstances are such that the receiptor is estopped to deny his liability to the officer for the property covered by his receipt, it seems clear that the creditor may insist that the officer shall enforce his levy, and that the latter is liable to account to the creditor for the goods seized; and hence that the case is not within the rule which releases the receiptor from liability. On this subject of estoppel in such cases, we can do no better than to quote a section from Drake on Attachments, inserting therein the authorities cited in the notes to such section:

“§ 392. But as between him [the receiptor] and the officer, in an action by the latter on the receipt, where the receipt admits the goods to be the defendant's or to have been attached as his, it has been repeatedly held that the bailee is estopped by the receipt from setting up property in himself. *Johns v. Church*, 12 Pick., 557; *Robinson v. Mansfield*, 13 id., 139; *Bursley v. Hamilton*, 15 id., 40; *Dewey v. Field*, 4 Met., 381; *Sawyer v. Mason*, 19 Maine, 49; *Penobscot Boom Co. v. Wilkins*, 27 id., 345; *Barron v. Cobleigh*, 11 N. H., 557; *Drew v. Livermore*, 40 Maine, 266. And in New York it was so ruled in a case where the receipt contained no such admission, but simply an acknowledgment of having received the property, and a promise to redeliver it at a certain time and place. *Dezell v. Odell*, 3 Hill, 215. Later cases, however, qualify this general rule. While it is conceded on all hands that a receiptor who conceals from the officer his ownership of the property, and suffers it to be attached as the defendant's, thereby preventing the officer, perhaps, from attaching other property, is precluded, when sued on the receipt, from setting up property in himself; yet, it is considered to be materially

Perry vs. Williams.

different where he makes known to the officer, at the time of the attachment, that the property is his, and not the defendant's. In such case it is held in Massachusetts that the bailee may set up property in himself, not as a bar to the action, but as showing the officer entitled only to nominal damages (*Bursley v. Hamilton*, 15 Pick., 40); while in Vermont and in California it is considered to constitute a full defense. *Adams v. Fox*, 17 Vt., 361; *Bleven v. Freer*, 10 Cal., 172. See *Jones v. Gilbert*, 13 Conn., 507. And in New Hampshire it was held that the giving of a receipt for the property by the owner of it is no bar to an action of trespass by him against the attaching officer. *Morse v. Hurd*, 17 N. H., 246."

In the present case it is alleged in the answer, in substance (as we understand it), that when the receipt was given the defendant asserted his ownership of the property. We find no element of estoppel in the case. It is not admitted in the receipt that the debtor was the owner of the property, and the record fails to show that the defendant has made any admission or done any act which estops him from asserting that he is the owner of the property.

We conclude, therefore, that the case is within the general rule above stated, and that it is competent for the defendant to show, in bar of the action, that he was the owner of the property and asserted such ownership when the receipt was given. Because he was not permitted to do so, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

By the Court. — So ordered.

 LAWE vs. HYDE.

LAWE vs. HYDE.

EQUITY: EJECTMENT: PLEADING: PRACTICE. (1) *Forfeitures not enforceable in equity.* (2, 3) *Suit in equity changed to ejectment by consent.* (4) *Special complaint in ejectment setting out plaintiff's title.* (5) *Lacking averments supplied here by stipulation.* (6) COUNTERCLAIM in ejectment for release of plaintiff's claim of title. (7) DEMURRER to counterclaim goes back to complaint.

DEED. (8) *Omission of grantee's name immediately after words of grant, how cured.* (9, 10) *Condition subsequent irregularly inserted.* (11, 12) *Condition subsequent construed.*

1. A proceeding in equity to enforce a forfeiture cannot be sustained.
2. A suit in equity may be changed into an action at law by consent. Whether such a change can be otherwise made, is a question not raised by the record in this case.
3. Where it was impossible to decide the cause on the merits while the record presented it as a suit in equity, and both parties had fully argued the merits, and were desirous of a decision thereon, this court reserved its judgment upon the merits long enough to give them an opportunity to amend the record, by stipulation or otherwise, so that the action might stand as one in ejectment.
4. The statute (ch. 141, sec. 4, R. S.), though it does not require the complaint in ejectment to set out the plaintiff's title, does not prohibit special complaints in that form; and it seems a proper form where the rights of the parties depend wholly upon questions of construction for the court.
5. A stipulation of the parties having been filed in this court, that this action should stand as one of ejectment by the plaintiff therein against the defendant, this court holds the stipulation as supplying any missing formal averments required by the statute in complaints of that character, and treats the complaint as a special complaint in ejectment setting out the plaintiff's title.
6. Defendant in ejectment cannot, generally, set up a counterclaim resting on his *legal* title, for a release to him of plaintiff's claim of title, which the answer alleges to be void on its face, and without color of right. *Jarvis v. Peck*, 19 Wis., 74, distinguished.
7. Under the statute, a counterclaim in the answer is a *pleading to the complaint*; and where the latter discloses want of jurisdiction, or fails to state a cause of action, a demurrer to a counterclaim goes back to the complaint.
8. The omission of the grantee's name immediately after the operative words

Lawe vs. Hyde.

of grant in a deed, is cured by the *habendum* to him (by his name), his heirs and assigns.

9. Though conditions regularly follow the *habendum*, they are good in any other place.
10. A deed, after the words of grant and a description of the premises by metes and bounds, contained words expressive of a condition subsequent, followed by the words "together with all and singular the hereditaments and appurtenances," etc., and these followed by the *habendum*. *Held*, that it was a good conveyance in fee on condition subsequent.
11. At the date of said conveyance, the Lawrence Institute (since Lawrence University) was incorporated to be "*located*" within certain limits, which included the land conveyed, at such place as the trustees of the corporation should select, and to be "*erected* on a plan sufficiently extensive," etc. Plaintiff deeded thirty-one acres in section 26, town 21 north, range 17 east, to one L., his heirs and assigns forever, "for the consideration of one dollar, for the benefit of the Lawrence Institute," with the condition, that said Institute "shall be *maintained* on section 26, as above described, and, in case of failure or *removal*, the said land shall revert back" to the grantor, or to his heirs or assigns. *Held*:
 - (1) That this condition, as one to defeat the estate, is to be construed *strictly*, and is satisfied by the selection and continued use of *any part of said section 26*, as the *site of the structures* of the university, and does not require them to be located and maintained on the land conveyed.
 - (2) That the fact of the conveyance being made, in terms, "for the *benefit*" of said university, does not imply that the land conveyed is to be *occupied* by it; but merely that such land is to be used for the *advantage* of the institution, by occupying, renting, *selling* or otherwise.
 - (3) That a sale and conveyance of a portion of the land by the university does not work a forfeiture of the title.
12. It appearing that the university is maintained on a part of the land so conveyed by plaintiff, *quære* whether the sale by it of the other part would be a breach, and work a forfeiture, even if the condition were that such university should be maintained on the land conveyed.

APPEAL from the Circuit Court for *Outagamie* County.

The complaint in this action alleged, in substance, that on or about August 3, 1848, "The Lawrence University of Wisconsin" "proposed to erect and maintain at Appleton a collegiate institute, and the plaintiff, being interested in the growth of Appleton, made a donation of certain lands to said university, for the objects and purposes of said institution, and

Lawe vs. Hyde.

for no other, and upon the condition that such lands were not and should not become the absolute property of said university, to be sold or transferred as it might see fit, or to be used for such purposes as it might see fit or desire for its interest; that it was understood and agreed that when such university should cease to use such lands for the purpose of a collegiate institution exclusively, and should sell or dispose of the same or any part thereof for other purposes, such lands should revert to the plaintiff; that, in pursuance of such arrangement, the plaintiff, on the 3d of August, 1848, executed a deed to Amos A. Lawrence, whereby he conveyed said lands in trust and for the benefit of said university, in consideration of one dollar; that in making such deed an ordinary printed form was used or copied from, and in the deed was inserted in writing the following conditions: "The above donation is made on conditions that 'The Lawrence Institute of Wisconsin' shall be maintained on section 26 as above described, and in case of failure or removal the said land shall revert back to said *Lawe*, or to his heirs or assigns;" that the persons acting for the said university and for the plaintiff at the time of the execution of said deed, were not sufficiently versed in law to insert the proper conditions in the deed, and by mutual mistake the same did not truly and fully express the intent and meaning of the parties; that said deed should have contained a condition that said lands were conveyed for the benefit of Lawrence University, for the purpose of a college and university, and for no other purpose, and in case the same should be used for other purposes, or sold by the defendant Lawrence or said university, such deed should become null and void, and such land should revert to the plaintiff; that on the 5th of August, 1874, said university sold to the defendant *Hyde* about twenty acres of said lands, and that *Hyde* received a conveyance of the same, well knowing the equities of the plaintiff, and had entered into possession of, and was about to sell the same for purposes of speculation in lots, to a large number of persons;

Lowe vs. Hyde.

and that the Lawrence University had wholly abandoned the said land so conveyed, for college uses, and had wholly ceased to maintain said institute thereon, and the said Amos A. Lawrence was about to ratify the conveyance to the said *Hyde*. Prayer, for an injunction restraining *Hyde* from selling said lands, and for the judgment of the court correcting the deed to Lawrence and establishing the title of the plaintiff to said lands.

Hyde answered that he had become the absolute owner of said lands by the deed named in the complaint; that he had purchased the same without notice of the plaintiff's equities, and had paid a large part of the consideration, and given his note for the balance; and that he had contracted to sell a large portion of said lands. He also set up the statute of limitations as a defense to so much of the complaint as sought a reformation of the deed; and, by way of counterclaim, set up at length his own title, and alleged that plaintiff wrongfully claimed title to said lands, and had brought suit to recover them, creating a cloud upon his title, and asked that plaintiff be adjudged to release to him all claim thereto, etc.

The granting clause of the deed to Lawrence was in the following words: "That the said parties of the first part give and convey for the consideration of one dollar, for the benefit of the Lawrence University, to his heirs and assigns forever, all that piece or parcel of lands," etc.

The plaintiff demurred to the counterclaim for insufficiency of facts; and from an order sustaining the demurrer, the defendant *Hyde* appealed.

Gerrit T. Thorn, for appellant:

1. All the facts necessary to bring this case within sec. 29, ch. 141, R. S., are stated in the counterclaim. *Wals v. Grosvenor*, 31 Wis., 682. The counterclaim is substantially an action *quia timet*, and, without the statute, a bill in equity would lie when the party is not in a position to force one claiming adverse title into a court of law to try its validi-

Lawe vs. Hyde.

ty. *Moran v. Palmer*, 13 Mich., 368; *Alton Marine & Fire Ins. Co. v. Buckmaster*, 13 Ill., 201. 2. Conditions subsequent, which tend to avoid estates, are not regarded with favor, and are strictly construed as against the lessor or grantor. *Jackson v. Silvernail*, 15 Johns., 278; *Livingston v. Stickles*, 7 Hill, 253; *Hadley v. Hadley Mfg Co.*, 4 Gray, 140; 12 Barb., 440; 27 Miss., 203; 49 Ill., 425. 3. Evidence would not be received of the nonpayment of a nominal consideration for the purpose of destroying the deed. The words of the deed were effectual as a bargain and sale. *Bank of U. S. v. Housman*, 6 Paige, 526; *Meriam v. Harsen*, 2 Barb. Ch., 232; *Wood v. Chapin*, 13 N. Y., 509; *Lynch v. Livingston*, 6 id., 422; *Long Island R. R. Co. v. Conklin*, 29 id., 572. 4. The true construction of the condition is, that a building for educational purposes, to be used as such under the auspices of the Lawrence Institute, should be built and maintained; and the *bona fide* erection of the building satisfied the condition and vested the *title in fee* absolutely in the Lawrence Institute. *Larabee v. Carleton*, 53 Me., 211, 213; *Mead v. Ballard*, 7 Wall., 290. 5. Any other construction of the condition would render it void as repugnant to the nature of the estate conveyed. It would be a prohibition of the power of alienation, and of no force. Co. Litt., 206; *Doe v. Biggs*, 2 Taunt., 109; *Jossaume v. Abbot*, 15 Sim., 127; *Youde v. Jones*, 13 M. & W., 534; *Webb v. Webb*, 29 Ala., 606; *Sitzman v. Pacquette*, 13 Wis., 312; *Stucklesby v. Butler*, Hob., 300; *McWilliams v. Nisly*, 2 Serg. & R., 513; *Newkerk v. Newkerk*, 2 Caines, 345; *Craig v. Wells*, 1 Kern., 281; *DePeyster v. Michael*, 2 Seld., 467; *Overbagh v. Patrie*, 8 Barb., 28; *S. C.*, 2 Seld., 510; *Hill v. Priestly*, 52 N. Y., 635; *Shep. Touch.*, 129-133. Possibly the words of the deed might be construed as a covenant to erect and maintain a building on the land, but this construction would not help the defendant. *Paschall v. Passmore*, 3 Harris, 295, 307; 49 N. H., 322. 6. The deed to Lawrence

Lawe vs. Hyde.

conveyed the absolute title in fee to the institute. It was a simple trust without further specifications or directions, and the *cestui que trust* had the right of possession and the disposing of the estate. Under the statute of uses, 27 Henry VIII, c. 10, the beneficial use was converted into the legal ownership without any action on the part of the trustee. *Goodrich v. City of Milwaukee*, 24 Wis., 429; *Lewin*, 21; *Shep. Touch.*, 508; *Welch v. Allen*, 21 Wend., 147; *Nicoll v. Walworth*, 4 Denio, 385; *Ring v. McConn*, 10 N. Y., 268; *Ex parte De Kay*, 4 Paige, 403. Such interest cannot be made incapable of alienation, or settled in a series of limitations tending to a perpetuity. *Nichols v. Levy*, 5 Wall., 441. Our statute restricting the suspension of the absolute power of alienation is applicable to every species of conveyance and limitation. *Yates v. Yates*, 9 Barb., 324; *Levy v. Levy*, 33 N. Y., 130; *Beekman v. Bronson*, id., 308; *Bascom v. Albertson*, 34 id., 598. Where the power of alienation is suspended for an indefinite period, the trust is void. *Donaldson v. Am. Tract Soc.*, 1 N. Y. Sup. Ct. R., Addenda, 15; *Leonard v. Bell*, id., 608; *Kiah v. Grenier*, id., 388; *S. C.*, 36 N. Y., 220. In this case the contingency may never happen. There may never be a *failure or removal* of the institute. All conditions which, if complied with, must lead to a perpetuity, are void (*Att'y Gen. v. Greenhill*, 9 Jur., N. S., 1307); and this is such a condition. *Boynnton v. Hoyt*, 1 Denio, 54; *Bascom v. Albertson*, *supra*; *Ferris v. Gibson*, 4 Edw., 707; *Arnold v. Gilbert*, 5 Barb., 190; *Proprietors etc. v. Grant*, 3 Gray, 142, and numerous cases there cited; *Co. Litt.*, 265 a; 45 Me., 359; 8 Blackf., 138; 2 Dutch., 13; 2 Patt. & Heath, 357; *Curtis v. Lakin*, 5 Beav., 147; 4 Kent, 283; 46 N. H., 234; 16 Wend., 121; *Sears v. Russell*, 8 Gray, 86; *Sears v. Putnam*, 102 Mass., 5-7; *Taylor v. Gould*, 10 Barb., 398, and cases there cited; *Welch v. Foster*, 12 Mass., 97; *Stanley v. Colt*, 5 Wall., 119.

Gabe Bouck, for respondent:

Lowe vs. Hyde.

1. The counterclaim is not well pleaded. An equitable defense by way of counterclaim to a legal action, means the existence of such a state of facts as would induce a court of equity, in the exercise of its general jurisdiction, to restrain the prosecution at law. *Cramer v. Benton*, 4 Lans., 293. Such a counterclaim can be interposed only in cases in which before the code the defendant would have been compelled to file his bill in equity to assert his rights. *Gleason v. Moen*, 2 Duer, 639; *Leavenworth v. Parker*, 52 Barb., 132; *Boston Silk & Woolen Mills v. Bull*, 37 How. Pr., 299. The general rule is, that an action lies to remove a cloud only when the defect does not appear upon the record. 1 Story's Eq. Jur., § 700; *Cox v. Clofft*, 2 Coms., 123; *Farnham v. Campbell*, 34 N. Y., 480; *Fonda v. Sage*, 48 id., 173. This court now holds that a party can bring his action under the statute (sec. 29, ch. 141, R. S.) upon a mere adverse claim of title; but an action not brought under the statute cannot be sustained if the defects of the adverse claim appear upon the record. *Shepardson v. Supervisors*, 28 Wis., 593; *Wals v. Grosvenor*, 31 id., 684. Where the claimant of the adverse title brings suit at law, equity will not interfere in behalf of him in possession. *Ins. Co. v. Bailey*, 13 Wall., 616.

2. The only construction that can be given to the condition in the deed is, that the university should be maintained upon the lands donated, in sec. 26. It is no compliance with the condition to maintain the university on a part of the lands, and divert the balance. No precise words are required to make a condition subsequent; the condition must be founded upon the intent of the parties. *Underhill v. S. & W. R. Co.*, 20 Barb., 455; *Rogan v. Walker*, 1 Wis., 527; 2 Chand., 133. The deed upon its face purports to be a gift. It does not pretend to grant, bargain or sell, and does not even name any grantee to whom it "gives and conveys."

3. The condition is valid, unincumbered with any limitations. It is a donation for certain purposes, with reversion to grantor upon failure to use

Lawe vs. Hyde.

the land for those purposes. The validity of such conditions is undoubted. *Plumb v. Tubbs*, 41 N. Y., 442; 4 Kent's Com., 126; 2 Washb. R. P., 2; *Police Jury v. Reeves*, 6 Martin, N. S., 224; *Pickle v. McKissick*, 21 Pa. St., 232; *Kiek v. King*, 3 id., 436; *Collins v. Marcy*, 25 Conn., 242; *Crary v. Wells*, 1 Kern., 315; *Crary v. Blanchard*, 8 Pick., 284; *Austin v. Cambridgeport*, 21 id., 215; *Sperry v. Pond*, 5 Ohio, 387; *Nicoll v. E. R'y Co.*, 12 N. Y., 121; *Gilbert v. Peteler*, 38 id., 165; *Congregational Society v. Stark*, 34 Vt., 243; *Gillis v. Bailey*, 21 N. H., 149; *Basher v. Cobb*, 36 id., 344; *Cornelius v. Joins*, 20 N. J., 376; *Dolan v. Mayor of Baltimore*, 4 Gill, 394; *Harris v. Shaw*, 13 Ill., 456; *Carter v. Chandran*, 21 Ala., 72; *Ludlow v. N. Y. & H. R. R. Co.*, 12 Barb., 440; *Gillespie v. Broas*, 23 id., 370; *Spaulding v. Hallenbeck*, 39 id., 79; *Knowlton v. Walker*, 13 Wis., 295; *Smith v. Smith*, 23 id., 176; *Dorr v. Harrahan*, 101 Mass., 531. 4. Such conditions as this are not in conflict with the statute of perpetuities. An estate being subject to a condition does not affect its capacity of being aliened. 2 Washb. R. P., p. 19; *Taylor v. Sutton*, 15 Ga., 103; *Wilson v. Wilson*, 38 Me., 18; *Underhill v. Sar. & Wash. R. R.*, *supra*. When an estate in fee simple is created on conditions, the entire estate does not pass out of the grantor. 2 Washb. R. P., 19; *Proprietors, etc., v. Grant*, 3 Gray, 146; *Ludlow v. N. Y. & H. R. R.*, *supra*; 4 Kent's Com., 127. 5. When public spirited citizens donate land for charitable or educational purposes, it should be strictly devoted to such uses, and the law should not permit a diversion to other uses.

The following opinion was filed February 29, 1876.

RYAN, C. J. The complaint purports to be against Mr. Lawrence, the grantee of the respondent, the University and the appellant, in equity, for reformation of the condition subsequent in the respondent's deed, for forfeiture for condition broken, and for possession. Aside from the statute of limita-

Lowe vs. Hyde.

tions, a proceeding in equity to enforce a forfeiture cannot be sustained. *Clark v. Drake*, 3 Pin., 228.

The case was argued at the bar as an action of ejectment for forfeiture for breach of the condition as it stands in the deed. And it was stated that the respondent had abandoned his equitable proceeding, discontinued as to Mr. Lawrence and the University, and was prosecuting the case against the appellant alone, as an action of ejectment.

The return does not disclose such discontinuance, or any action of the parties or of the court below tending to change the character of the cause. The question therefore is not here, whether, under the code, such a change of a suit in equity into an action at law may be made. See note of DIXON, C. J., to *Brayton v. Jones*, 5 Wis., 627, 2d ed. Of course this can be done by consent; but in the meantime, we do not feel authorized to decide the questions argued on this appeal, when they are not raised by the record before us. The questions are important in principle and to the parties. And both parties appear anxious for a decision of the case upon the merits. It was well and fully argued on both sides, and, if properly before us, we are prepared to pass upon it. We have therefore concluded to reserve our judgment long enough to give the parties an opportunity to amend the record by stipulation or otherwise, so that the cause may stand as an action of ejectment by the respondent against the appellant. If such amendment of the record be made, we will pass upon the questions submitted, without further argument; otherwise we will decide the case as it now stands in the record.

Judgment reserved.

The following opinion was filed March 21, 1876.

RYAN, C. J. Upon the suggestion made in the former opinion on this appeal, the parties have since filed a stipulation that the action shall stand as an action of ejectment by

Lawe vs. Hyde.

the respondent against the appellant for the recovery of the premises in controversy. We hold the stipulation as supplying any missing formal averments required by the statute in complaints of that character, and shall consider the complaint as a special complaint in ejectment, setting out the respondent's title. The statute does not require, but does not prohibit, such special complaints. And it seems a proper form when, as in this case, the rights of the parties appear to depend wholly upon questions of construction for the court. See *Sage v. McLean*, 37 Wis., 357.

The statute authorizes an equitable, as well as a legal, defense in ejectment. An equitable defense generally, if not necessarily, concedes the legal title in the plaintiff. And, with a view of bringing together the legal title and the possession, an equitable defense can be made by counterclaim only. *Lombard v. Cowham*, 34 Wis., 486; *Dupont v. Davis*, 35 id., 631.

The appellant's counterclaim in this case rests clearly on his legal title, setting up no equitable defense. Judgment for him on his answer would be equivalent to the affirmative judgment prayed by his counterclaim. And it looks like an incongruity to pray that the respondent should release to the appellant a claim of title which the appellant maintains to be void on its face, without color of right. If such a counterclaim could be supported, we do not perceive why every defendant in ejectment might not counterclaim a release from the plaintiff. Such a counterclaim is very distinguishable from that in *Jarvis v. Peck*, 19 Wis., 74. We must hold this counterclaim ill taken.

The effective difference between a mere answer and a counterclaim is familiar to us all. But the essential distinction between them as pleadings does not appear to be so clear. The question whether a demurrer to a counterclaim would reach back to the complaint is suggested, but not decided, in *Dietrich v. Koch*, 35 Wis., 618. Generally, perhaps, the an-

Lowe vs. Hyde.

answer proper and counterclaim are indistinguishable, as in that case, where the demurrer was held to reach back to the complaint, through the same pleading of the defendant as an answer. See *Benedict v. Horner*, 13 Wis., 256; *Congar v. Chamberlain*, 14 id., 258; *Jarvis v. Peck*, 19 id., 74; *McConihe v. Hollister*, id., 269; *Matteson v. Ellsworth*, 28 id., 254; *Resch v. Senn*, 31 id., 138; *Lombard v. Cowham*, *supra*, and many other cases in this court. The distinction has been so slight that it has sometimes been a nice question of construction whether the pleading be an answer proper or a counterclaim or both in one. But aside from all rules of construction, the statute itself appears not only to make a counterclaim a pleading to the complaint, but to make it essentially an answer in all cases; for it requires the answer to set up new matters constituting defense or counterclaim. Whatever may be its effect by way of cross action, it is certainly a pleading to the complaint. And the old rule that demurrers reach back to the first defective pleading still applies where the complaint discloses want of jurisdiction or fails to state a cause of action (*Lawton v. Howe*, 14 Wis., 241; *Ferson v. Drew*, 19 id., 225; *Eaton v. North*, 25 id., 514); and demurrers to returns to original writs go back to the petition or information on which the writ issued. *State v. Tierney*, 23 Wis., 430; *State v. Braun*, 31 id., 600; *State v. Supervisors*, 34 id., 169. So the demurrer here reaches the merits of the complaint, and brings us to the real question in the cause.

The omission of the grantee's name immediately after the operative words of grant in the respondent's conveyance is cured by the *habendum* to the grantee, his heirs and assigns. *Jamaica, etc., v. Chandler*, 9 Allen, 159.

"Conditions regularly follow the *habendum*, but are good in law in any other place." *Horner v. Railway Co.*, 38 Wis., 174. This was always the rule. *Cromwell's case*, 2 Rep., 696.

The respondent's deed is therefore a good conveyance in

 Lawe vs. Hyde.

fee, upon condition subsequent. Co. Litt., 201a. And the question here is the construction of the condition.

The rule of construction is old, certain and uniform. "*Conditio beneficiæ, quæ statum construit, benigne, secundum verborum intentionem est interpretanda; odiosa autem, quæ statum destruit, stricte, secundum verborum proprietatem, accipienda*" (*Fraunces' case*, 8 Rep., 89b; Co. Lit., 218a); "as strictly as the words of any penal statute," as said in *Rungun v. Fogosse*, 1 Plowd., 1; *Jackson v. Silvernail*, 15 Johns., 278; *Hadley v. Hadley*, 4 Gray, 140; *Morse v. Ins. Co.*, 30 Wis., 534.

At the date of the respondent's conveyance, the Lawrence Institute, since called the Lawrence University, was incorporated, to be located within certain limits, which include the land conveyed, at such place as the trustees of the corporation should select, and to be erected on a plan sufficiently extensive, etc. Session Laws of 1847, p. 5.

This location clearly intends the selection and acquisition of the site of the structures for the use of the university. And we have no difficulty in holding the site so to be selected and acquired to be what the condition of the respondent's deed requires to be maintained. The location of the charter and the maintenance of the deed both refer to the site of the proposed university.

Neither could well refer to existing structures for a university. Even the village of Appleton, the forerunner of the present city, does not appear to have been yet founded; certainly not incorporated. Ch. 96 of 1850; ch. 127 of 1853. The proposition of the charter was to found a seat of learning in the wilderness. A site could be presently selected and acquired; but a naked site only, for future structures. So the charter says, and so the deed implies.

The location of the charter was a proceeding *in principio*, without antecedent. But the maintenance of the deed implies, as an antecedent, location under the charter. Mainte-

Lowe vs. Hyde.

nance presupposes existence, as a condition absolute. What is *in posse* cannot be maintained, but only what is *in esse*. The university might be located, anytime, anywhere, within the terms of the charter. But it could be maintained nowhere until it had been located somewhere. The rule of construction will not permit us to enlarge the word used, in aid of the condition, so as to import that the university shall be first located and thereafter maintained, within the limits indicated. The condition requires maintenance only, implies location under the charter already made, and rests on the maintenance of that.

It is indeed the university which the condition requires to be maintained. If the sense were an extant university, with its grounds, buildings, library, apparatus, faculty and students, to constitute it one, the condition might well be, as presently suggested, void for impossibility. But we must construe words according to the conditions under which they are used. The site of a university is a part of it. A site indeed is the first requisite for it. And a site selected and acquired for a prospective university, presently to be raised upon it, might well be regarded as an inchoate university; and as such could be maintained. We do not see what else the term could mean under the circumstances; and it can mean that.

The condition provides reverter of the estate granted, upon failure or removal. Removal plainly means removal of the site of the university elsewhere. Failure appears to mean failure to establish the university upon the site. The rule of construction will not warrant the introduction of another antecedent for the word, so as to signify failure to locate. Maintenance is the antecedent of both words; removal of the university to another site, and failure to establish it on this site, appear equally to violate the condition to maintain on this site. The object of the condition is the maintenance of the site of the university. Change of site or failure of the university alike defeat the object.

Lowe vs. Hyde.

There is no limit of time in the condition for its operation. It runs from the delivery of the deed. If it related to a university in actual operation, or if, at the date of the deed, the location of the university had not been made, or had been made elsewhere than the condition indicates, it might be a grave question whether the condition would not be void, as uncertain or impossible. Co. Lit., 206 a, b, 219 a; 2 Greenleaf's Cruise, 4; Washb., 447.

And the most favorable construction, and we hold the true construction, of this condition is that it relates to a site selected for the university under the charter.

As the condition implies a location made, so it implies where it has been made. And it is very apparent that it is not on the land conveyed. Whether the conveyance was drawn by skillful or unskillful persons, if the condition related to location on the land conveyed, present or future, it would have been the most obvious and easy thing to say.

If such had been the object of the conveyance and of the condition, it is almost incomprehensible that it should have been overlooked or left to argumentative inference. It appears to us that no person of sufficient intelligence to draw the deed, lawyer or layman, could well avoid direct expression of so radical and vital a fact, so readily made; and go out of the way, in more difficult circuitry of language, to obscure the intent. Indeed not to obscure it, but to negative. For the condition specifies the land to revert upon breach, "the said land," that is the land conveyed, which is part of section twenty-six, but provides for the maintenance of the university on section twenty-six, at large, without limit of part, implying anywhere within the section. It says section twenty-six as above described, and so it is above described, as a section may best be, by its town and range; but it says, in that regard, neither lot one nor lot two, nor "the said land" in the section, but the section itself, absolutely, without other description or limitation. We cannot hold the section as above

Lawe vs. Hyde.

described to mean some thirty acres of the section above described. Words, expressing the whole cannot, to aid a forfeiture, be held to intend a part only; they include the part, but are not limited to it. The two descriptions, section twenty-six as above described, and the said land, stand in apparent contrast, signifying different things. If the conveyancer had intended the same thing, he must have chosen language to conceal and not to express the intention. The two phrases, so used, could not well be forced by any rule of construction into one meaning. Certainly not to aid a condition subsequent inserted by a grantor in his conveyance, and set up by him to defeat his grant. *Verba chartarum fortius accipiuntur contra proferentem.*

The respondent's conveyance is to Mr. Lawrence, for the *benefit* of the university. Benefit is here equivalent to advantage, not to occupation; advantage by occupying, renting, selling, or otherwise. Benefit includes occupation, but is not confined to it. It is a broad word. A devise of the benefits of real estate for a term, under a will devising the fee elsewhere, appears to have been held to vest an estate in the land for the term. *McCullough's Appeal*, 4 Yeates, 23. Here the word seems to include any beneficial use which may be made of the fee simple. And here again it is difficult to comprehend, if the purpose of the grant was a site for the university, how the conveyancer, expert or inexpert, contrived to miss some direct, definite and obvious word signifying site, and to lose his meaning in so large and almost indefinite a word as that used. And so the deed, outside of the condition, is in striking accord with our construction of the condition itself.

If we had been able to adopt the respondent's construction, we are not at all sure that it would have availed him. For it appears that the university is maintained on part of the land conveyed. And it is not certain that the sale of the other part would work a breach of the condition and a reverter of the

Herzer vs. The City of Milwaukee.

whole. For it seems that such a condition must defeat the whole estate or none. *Shep. Touch.*, 127; *Cabet's case*, 1 Rep., 83 b; 2 *Greenleaf's Cruise*, 3. And it might be difficult to enforce forfeiture of an estate in land for failure to maintain on it what is maintained on part of it.

"This condition, like every condition to defeat an estate, must be construed strictly, not to say literally. If the grantors intended more, they should have expressed it." *Hadley v. Hadley*, *supra*. If it was the intent that the university should be located and maintained on the land conveyed, and that all the land conveyed should always be used as a site for the university, and no part of it for any other purpose, we can only say that the condition fails to express such intent.

In our view, there does not appear in the complaint any breach of the condition subsequent in the respondent's deed, to work a reverter. The complaint therefore fails to state a cause of action, and the demurrer should have been sustained to it.

By the Court. — The order of the court below is reversed, and the cause remanded with directions to sustain the demurrer to the complaint.

LYON, J., took no part in this case, having been a trustee of the Lawrence University during some of the proceedings involved.

HERZER VS. THE CITY OF MILWAUKEE.

MUNICIPAL CORPORATIONS. *Waiver of damages for change in grade of street.*

The common council of a city having ordained a change of the grade of numerous streets, in a part of the city in which plaintiff's lots were situate, and having executed the ordinance in part, plaintiff, who was suffering serious special injury from such *partial* execution, in order to relieve

Herzer vs. The City of Milwaukee.

himself from such injury, signed a petition to the common council to have the street fronting his lots completed according to such grade. *Held*, that this was *not a waiver* of his right to damages for such change of grade.

APPEAL from the Circuit Court for *Sheboygan* County.

Action for damages caused by a change of grade of the street in front of certain lots owned by plaintiff in the defendant city. The facts are undisputed, and are substantially as follows: In 1869, the common council of Milwaukee passed an ordinance changing the grade of the streets surrounding some fifty blocks lying in a compact form adjacent to each other. Block 116, in which the plaintiff owned two lots, was one of these. In 1870, pursuant to such ordinance, the streets bounding block 116 on the north and south, and other streets east of said block, but not adjoining it, were worked to the new grade. Certain owners of lots in that block on both sides of plaintiff's lots voluntarily filled the street bounding the block on the east, in front of their respective lots, to such new grade, without objection by the city authorities. The results were, that the plaintiff had no outlet from his lots by way of the street in front of them without ascending an abrupt grade four feet high; and a certain natural outlet for surface water from adjacent high grounds to the river was obstructed, so that such water collected and remained upon the plaintiff's lots. Such being the condition of the grade and of his lots, the plaintiff, in 1871, at the request of a member of the board of public works of the city, and of his neighbors, signed a petition to the common council that the street on which his lots fronted be graded for the distance of three blocks, including the portion thereof in front of his lots, to the grade established in 1869. Several other resident owners of lots abutting on the proposed improvement also signed such petition, and the street was graded in accordance therewith.

The damages for which the action was brought were caused by such grading.

Herzer vs. The City of Milwaukee.

The court refused to charge the jury, as requested by the defendant, that, by signing such petition, plaintiff waived his claim for damages; and plaintiff had a verdict and judgment for the amount of damages which it was admitted he had sustained by reason of the change of grade. Defendant appealed from the judgment.

L. S. Dixon, for appellant:

Whether a petition was essential in altering the established grade of the street, or not, the act of the plaintiff in signing it was voluntary, and he will not be heard to allege that he has suffered injury. *Broom's Leg. Max.*, 268; *Harrup v. Bayley*, 6 E. & B., 224; 88 E. C. L., 218, 224; *Ferguson v. Landram*, 1 Bush, 548, 565; 5 id., 230; *Wild v. Deig*, 43 Ind., 435; *State v. Hudson City*, 34 N. J. Law, 25, 541; *Burlington v. Gilbert*, 31 Iowa, 356; *Van Hook v. Whitlock*, 26 Wend., 43; *Karber v. Nellis*, 22 Wis., 215; *Saxsmith v. Smith*, 32 id., 299, and cases there cited; Laws of 1874, ch. 184, sub-ch. VII, sec. 8.

James G. Jenkins, for respondent:

1. The charter of the city provides for the payment of all damages arising from the alteration of an established grade; and the ordinance under which this improvement was made, inevitably carried with it, as a part thereof, this provision of the charter, and entitled the plaintiff to his damages. 2. The damage to the plaintiff's lots was not in consequence of the petition, but had accrued prior thereto, by reason of the changed grades in front of adjoining lots on both sides. *Columbus v. Hydraulic Co.*, 33 Ind., 435. 3. To petition for the execution of the ordinance, which was passed without plaintiff's consent, and partly carried out, was simply saying that, considered as a whole with all its incidents and legal consequences, including the liability for damages, the act was right and proper and a desirable public measure; and did not involve in its consequences a release by the petitioner of all claim for damages. 4. The petition was not voluntary.

Herzer vs. The City of Milwaukee.

The plaintiff was already suffering injury from the partial execution of the ordinance, and the object of the petition was to prevent further injury. Obtained under such circumstances, it cannot be tortured into a release of the statutory damages. Broom's Leg. Max., 202, 208.

LYON, J. The only question to be determined on this appeal is, Does the signing of the petition, by the plaintiff, to have the street in front of his lots worked to the grade of 1869, operate as a waiver of his right to recover damages for the injury to his lots caused by such grade? We think this question must be determined in the negative. The maxim, *volenti non fit injuria*, which is invoked to defeat a recovery of such damages, is not applicable, because, under the circumstances of the case, such signing cannot, in any just sense, be said to be a willing or voluntary act. 1 Story's Eq. Jur., § 302. And herein lies the distinction between this case and the cases cited by the learned counsel for the appellant, in which the maxim has been held applicable. It is believed that in each of them the act which was held to operate as an estoppel was purely a voluntary act.

The plaintiff was suffering serious special injury by reason of the partial execution of the grade which the city authorities had established without his consent, and it would be simply monstrous to hold that he could not ask the city to relieve him from such injury by completing the grade in front of his lots, or ordering it to be done, without thereby waiving or surrendering his right to recover the damages caused by the change of grade. The above maxim cannot properly be made the instrument of such injustice. How the case would have stood had the plaintiff petitioned the council in the first instance to establish the grade of 1869, or to *commence* work upon the new grade, we do not here determine. We only decide that under the undisputed facts of the case, as disclosed by the record, the plaintiff, by signing the petition, did not

Hay vs. Lewis and others.

waive his right to damages for the injury to his lots caused by working the street in front of them to the grade established in 1869.

By the Court. — Judgment affirmed.

HAY VS. LEWIS and others.

PRACTICE. (1-3) *Correcting record on appeal. Printed case.*

SPECIFIC PERFORMANCE: SALE OF LAND. (4, 5) *When agreement to sell will not be specifically enforced.*

1. This court has no power to amend the record as returned by the trial court; though it can, on proper suggestion, order a further return, or remit the record for correction, and enforce its orders.
2. The sole office of a printed case is to present correctly the material parts of the record in a form convenient for the use of the court.
3. A motion to strike from a printed case matter actually found in the record returned to this court, on the ground that such matter is not a proper part of the record, cannot be granted, and would be of no avail if granted.
4. Specific performance of a contract of sale of land will not be enforced, unless the court is satisfied that the claim for a deed is fair and reasonable, and the contract equal in all its parts and founded on an adequate consideration.
5. Before the land-owner's agent had accepted H.'s offer of \$450 for the land here in question, one T. had offered such agent \$550 for it; but H. objecting to the acceptance of T.'s offer, and insisting upon his own, T. withdrew his offer, and the agent accepted that of H., and gave a receipt for \$50 then paid, as a payment on the purchase price of the land. Afterwards T. purchased of the owner directly for \$600. *Held*, that the court will not require the title to be conveyed to H. or his assignee.

APPEAL from the Circuit Court for Iowa County.

Action for the specific performance of a contract for the sale of a house and lot. The case made in the complaint is substantially as follows: *Mrs. Lewis* was the owner in fee of a house and lot in Mineral Point, which she desired to sell;

Hay vs. Lewis and others.

and for many years *Mr. Henry* had been her special agent in respect to the property, and was authorized by her to find a purchaser for it, and to submit to her, by letter or otherwise, such offers as he might receive. In July, 1873, he submitted to her an offer made by one Jones of \$450, which, in August, she authorized him to accept; but Jones then declined to take the house. In May, 1874, *Henry* authorized Jones to obtain a purchaser for the property for \$450, whereupon Jones offered it to one Hilton for that sum, and the offer was accepted. On May 12, 1874, Jones informed *Henry* that he had sold the house for \$450, but did not name the purchaser. *Henry* communicated this offer to *Mrs. Lewis* by letter, and on June 2d she authorized the manager of the telegraph office in Chicago (F. C. Swain) to inform *Henry* by telegram that she accepted the offer, and he sent to *Henry* this despatch: "*Mrs. Lewis* accepts offer for house. Address her, 111 Rhodes Avenue, Chicago. F. C. SWAIN." The contents of this telegram were made known to Hilton, who made arrangements that the plaintiff should pay the purchase money and take the title to himself, and afterwards sell to him. Before *Henry* communicated the contents of the telegram to Hilton, he received an offer from the defendant *Treweek* of \$550 for the property, which offer was withdrawn during a conversation between *Henry*, Hilton and *Treweek* in respect to the matter. Afterwards, and on the same day, the contract was consummated between the plaintiff and *Henry*, when fifty dollars were paid, and the following receipt was given by *Henry*: "Received of *Robert Hay* \$50 per John Hilton, on account of the Eaton house and lot sold to him for \$450, and I am to send and get a deed, when he is to pay for the same. WILLIAM T. HENRY, Agent for *Mrs. Lewis*. June 6, 1874." *Treweek* had notice of this contract on the same day, and on the 8th of June, with the intent to deceive and defraud, he went secretly to Chicago, and there offered *Mrs. Lewis* for the property \$600, which she accepted, though well knowing that she had

Hay vs. Lewis and others.

previously accepted another offer; and on the 24th of June she executed to him a deed of the property. Prayer, that this deed be adjudged fraudulent and void, and *Treweek* required to quitclaim the property to plaintiff; that *Mrs. Lewis* and her husband be required to convey the property to plaintiff by warranty deed, etc.

The defendants answered separately, denying most of the material allegations of the complaint.

It appeared that the following letter was written and mailed to *Mrs. Lewis* on the day of its date: "Mineral Point, Wis., June 6, 1874. *Mrs. H. A. Lewis*, No. 111 Rhodes Ave., Chicago. Dear Madam: Party to-day paid me \$50 on account of the sale of the house, and I think will pay all the rest of the money on receipt of deed. I inclose deed, which please execute according to pencil directions on it, and return to me, when I will complete the matter. I dislike to sell it so low; have tried hard, but cannot get any more for it. If you cannot get Mr. Lewis to execute the deed, execute it yourself, and I will try if possible to get the party to take it that way. WM. T. HENRY."

The court found most of the allegations of the complaint to be true, and held, among other things, that the telegraphic despatch of June 2, 1874, was an acceptance by *Mrs. Lewis* of the offer made to her agent, and was sufficient to authorize him to enter into the contract with plaintiff, and such contract was binding; that plaintiff had paid the purchase money, and was entitled to a conveyance of the premises; that the conveyance to *Treweek* was taken with full knowledge on his part of all the plaintiff's rights; and that he must convey to the plaintiff. Judgment accordingly; from which the defendants appealed.

After the cause reached this court, but before a hearing, the respondent moved the court, on affidavit, that the printed case therein be amended in certain particulars. This motion was denied, and the following opinion filed, February 2, 1876:

Hay vs. Lewis and others.

PER CURIAM. This court has no power to amend the record as it is returned here from the court below. It can, on proper suggestion, order a further return, or remit the record for correction, and enforce its orders. But the court below alone possesses power to add to or take from the record. For this reason, apparently, the present motion is not to correct the record, but to strike out from the printed case what it is claimed is improperly made a part of the record. The sole office of the printed case is to present correctly the material parts of the record, in a form convenient for the use of the court. And the court cannot strike from the printed case where it properly and correctly follows the record. Were this to be done, the record itself would remain as it is, and would govern the judgment of the court. The respondent's motion, therefore, cannot be granted, and would not avail him, if granted.

Motion denied, with clerk's costs.

The cause was then argued upon the merits.

M. M. Cothren, for appellants:

1. The finding of the court was not supported by the evidence. 2. To render a contract binding upon a principal when made by an agent, it should be in the name of the principal; if the agent contracts in his own name, describing himself as agent or attorney for his principal, the contract is the contract of the attorney, and not of the principal. *Spencer v. Field*, 10 Wend., 88; *Stone v. Wood*, 7 Cow., 454; *Fowler v. Shearer*, 7 Mass., 19. 3. The suppression of the offer of *Treweek* was a fraud upon *Mrs. Lewis*, which would have released her from her obligation even if she had accepted the offer in time. If she had known all the facts, she never would have considered the plaintiff's proposition. A bill for the specific performance of a contract is addressed to the sound discretion of the court. The contract must be fair, just and

certain, and founded on ample consideration. *Smith v. Wood*, 12 Wis., 382; *Seymour v. Delancey*, 6 Johns. Ch., 222.

Moses M. Strong, for respondent:

1. The telegram was an acceptance of the proposition. *Trevor v. Wood*, 36 N. Y., 307; *S. C.*, 3 Abb., N. S., 355; *Scott & Jarn. Law of Telegraphs*, ch. 6, §§ 295, 296, 332, 333; *Redfield on Carriers*, §§ 541-551; *Parsons on N. & B.*, 486; *N. Y. & Wash. Telegraph Co. v. Dryburg*, 35 Pa. St., 298; *Dunning v. Roberts*, 35 Barb., 463. 2. If the communication had been verbal or by letter, it would have been an acceptance. It was no less so because sent by wires. *Adams v. Lindsell*, 1 Barn. & Ald., 681; *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.), 390; *Vassar v. Camp*, 1 Kern., 441; *Mactier's Adm'rs v. Firth*, 6 Wend., 103. 3. The telegram was sufficient authority to *Henry* to contract with plaintiff for the sale of the premises. The authority would have been sufficient if it had been verbal. *Story on Agency*, § 50, note 3; *Paley on Agency*, 159; 2 *Kent's Com.*, 614, § 41; 1 *Parsons on Con.*, ch. 3, sec. 2, note (s); *Coles v. Trecothick*, 9 Ves. Jr., 234; *Riley v. Miner*, 29 Mo., 439; *Rottman v. Wasson*, 5 Kans., 552; *Groff v. Ramsey*, 19 Minn., 44; *Long v. Hartwell*, 34 N. J., 116; *Shaw v. Nudd*, 8 Pick., 9; *Ewing v. Tees*, 1 Bin., 450; *Lawrence v. Taylor*, 5 Hill, 107; *Mc Whorter v. McMahan*, 10 Paige, 386; *Dodge v. Hopkins*, 14 Wis., 630. Counsel further argued that the findings were sustained by the evidence.

RYAN, C. J. In our view of this case it is unnecessary to determine whether any agreement was in fact made between the appellant *Mrs. Lewis* and the respondent, for the sale of her premises, or whether such agreement, if made, is valid under the statute of frauds.

For, in our view, a valid agreement may be assumed. "The question then recurs, Is it the dictate of sound legal discretion, that this agreement should be specifically carried into

Hay vs. Lewis and others.

execution by the authority of this court? It is an application to sound discretion. This has been the uniform language of the courts of equity. It is not a case requiring the aid of the court *ex debito justitiæ*. It is a settled principle that a specific performance of a contract of sale is not a matter of course, but rests entirely in the discretion of the court, upon a view of all the circumstances. 'The jurisdiction' as Lord ELDON observed, 12 Vesey, 331, 'is not compulsory upon the court, but the subject of discretion. The question is, not what the court must do, but what it may do, under the circumstances.' A court of equity must be satisfied that the claim for a deed is fair and just and reasonable, and the contract equal in all its parts, and founded on an adequate consideration, before it will interpose with this extraordinary assistance. If there be any well founded objection on any of these grounds, the practice of the court is to leave the party to his remedy at law for a compensation in damages." *Seymour v. Delancey*, 6 Johns. Ch., 222. This is the well established rule, expressly affirmed by this court. *Smith v. Wood*, 12 Wis., 382.

It is very certain that before *Mrs. Lewis'* agent had made any contract under which the respondent can claim, for the sale of her property for \$450, the appellant *Mr. Treweek* had offered the agent \$550 for it. Upon Hilton, under whom the respondent claims, objecting to the acceptance of *Treweek's* offer and insisting upon his own less offer, *Treweek*, to avoid controversy, withdrew his offer; and then the agent accepted Hilton's offer and gave the receipt in the name of the respondent. Subsequently *Treweek* purchased from *Mrs. Lewis* directly for \$600.

If *Mrs. Lewis* had authorized her agent to accept Hilton's offer, it was on the ground that it was for the highest price to be got. And the offer of a higher price ought to have been held, in good faith, to revoke the authority to accept the lower, yet unaccepted by the agent. And even when the higher offer was withdrawn, in the manner it was, we cannot but think

Menk vs. Steinfort.

that *Mrs. Lewis* ought to have been advised of the circumstances before the agent accepted the less offer. The case shows that the sale of her property, if sale it was, was for a less sum than it was reasonably apparent a little patience would have secured.

But however that may be, the respondent can claim only under Hilton. And it was by Hilton's means, acting in his own name but on behalf of the respondent, that *Treweek* was induced to withdraw his higher offer. Under such circumstances, we cannot hold the respondent's contract, if contract there was, to be, in the language of *Smith v. Wood*, just, fair and upon adequate consideration. The rule will not permit us to disturb *Mrs. Lewis'* sale for the higher price to *Treweek*, or to enforce specific performance of Hilton's alleged contract in the name of the respondent for the lower price, when Hilton is responsible for the withdrawal of the offer of a higher price. The respondent must be left to enforce any right which he may have, by action at law.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to dismiss the complaint.

MENK VS. STEINFORT.

REVERSAL OF JUDGMENT. (1) *Error in admitting evidence cured.* (3) *Inadmissible evidence rejected on erroneous grounds.* (5) *Error in charge cured.*

EVIDENCE: WITNESS. (2, 4) *Husband as agent of wife.*

1. An error in admitting evidence tending to show that there was *no consideration* for an instrument sued on, is immaterial where the jury find the instrument *a forgery*.
2. In an action by a married woman, her husband may testify in her behalf as to acts done by him as her agent, whether done in her presence or in her absence.

Menk vs. Steinfort.

3. An erroneous ruling that the husband could not testify to acts done by him as the wife's agent when she was present, is immaterial where it appears that he was offered as a witness *generally* in the cause, and not specially as to matters in which he had acted as her agent.
4. On taking a conveyance of certain property from defendant's intestate, plaintiff caused to be assigned to him a certain mortgage belonging to her husband, executed by one L. Afterwards plaintiff reconveyed to the intestate his said property, and, about a year thereafter, L. paid his mortgage debt to plaintiff's husband, and received from him a satisfaction of the mortgage theretofore executed by the intestate. In the transactions concerning those conveyances, plaintiff's husband acted generally as her agent. *Held*, that in this action he could not testify that he did not act as her agent in receiving the payment of L.'s mortgage.
5. A judgment will not be reversed for an error in the charge which was immediately and fully corrected.

APPEAL from the Circuit Court for *Jefferson* County.

The plaintiff, a married woman, brought this action against the defendant as administrator of the estate of one Wm. Abendroth.

A claim was presented to the county court against said estate upon an instrument in writing purporting to be a promissory note for \$2,500 and ten per cent. interest, payable in installments to the plaintiff or order, and purporting to have been signed by the defendant's intestate. The instrument is dated September 9, 1870, and receipts are indorsed thereon, signed by the plaintiff, for the first installment of principal, being \$300, and for two year's interest. The claim was disallowed by the county court, and plaintiff appealed to the circuit court.

In the latter court the claim was resisted by the administrator on the grounds, 1. That the signature to the instrument is a forgery; and 2. That if such signature is genuine, the note is invalid for want of consideration.

It appeared on the trial that in April, 1870, the intestate conveyed certain real estate and personal property to the plaintiff, and on September 9th of the same year plaintiff reconveyed to the intestate the same real estate and portions of

Menk vs. Steinfort.

the same personal property. Plaintiff claims, and the evidence on her part tends to prove, that the note or instrument in controversy was given by the intestate for a part of the consideration of such reconveyance. The administrator claims, and the evidence on his part tends to show, that the signature to such note is not that of the intestate, and that if it is his signature, there was no consideration for the note.

When the property was conveyed to the plaintiff, she caused to be assigned to the intestate, in part payment therefor, a mortgage belonging in whole or in part to her husband, executed by one Leshinger to secure the payment of \$600. About a year after the reconveyance to the intestate, Leshinger paid the debt secured by such mortgage to plaintiff's husband, who delivered to the mortgagor a satisfaction of the mortgage, theretofore duly executed by the intestate. Defendant's objection to the admission of proof of such payment was overruled. In all the transactions pertaining to such conveyances, plaintiff's husband acted as her agent, and had the principal management and control of the business.

The plaintiff's attorney stated, in general terms, that he offered Mr. Theodore Menk (plaintiff's husband) as a witness. Objection being taken by the defendant, the court said: "You may show anything by Mr. Menk which he did as the agent of his wife when she was not present. Otherwise his testimony is excluded." Mr. Menk was not examined as a witness.

In charging the jury the court said: "It stands here uncontradicted that on the 9th of September, 1870, *Mrs. Menk* reconveyed this brewery property to Abendroth, and it is claimed by her, and has been testified to by her upon the stand, that the consideration paid by Abendroth upon a reconveyance of the property was as follows: the note in suit, \$2,500; the Leshinger mortgage was surrendered back by Abendroth to *Mrs. Menk*;" — The plaintiff's attorney here inquired: "Your honor, does the testimony show that?"

Menk vs. Steinfert.

The court proceeded: "I am not stating what the testimony is. You will bear in mind that I am not attempting to state what the testimony shows, but what is claimed to be the testimony by the defense. But I understand that to be the testimony, nevertheless, of *Mrs. Menk*. I understand *Mrs. Menk* to have stated that the consideration paid and agreed to be paid by Abendroth on the reconveyance of this property was as follows: this note in suit, a reassignment of the Leshinger mortgage, and a surrender of the Menk mortgage for \$600; these three items making the amount." Exceptions being taken to so much of this charge as related to the Leshinger mortgage, the record states that a reference to the reporter's minutes of *Mrs. Menk's* testimony disclosed that she had not testified that Abendroth had surrendered back the Leshinger mortgage to her on the reconveyance of this property; and thereupon the court said to the jury: "It seems, gentlemen, that *Mrs. Menk's* testimony does not show that this Leshinger mortgage was transferred back on a resale of this property."

Two questions of fact were submitted to the jury: "1. Did William Abendroth, in his lifetime, make, execute and deliver to *Charlotte Menk* the promissory note in question, by writing his own name thereto as maker, as the same appears thereon, by his own proper hand? 2. Was the note in question executed and delivered by William Abendroth for a consideration actually received by him therefor?" The jury answered both questions in the negative. A motion on the minutes for a new trial was denied, and judgment was entered for the administrator for costs. From this judgment the plaintiff appealed.

D. Hall, for appellant, contended that the evidence as to the satisfaction of the Leshinger mortgage was incompetent, in the absence of proof connecting the plaintiff with it in any way; that if there was sufficient proof of her husband's agency in the matter to admit such evidence against her, she was en-

Menk vs. Steinfort.

titled to his testimony to prove that the payment and satisfaction had no relation to the resale or the note in question; and that the court charged, not only that the plaintiff testified to having received the Leshinger mortgage on the resale, but that she *did, in fact, receive it*, and this error was not cured by its mere retraction as to her statement.

G. W. Bird, for respondent:

1. If there was any error in the charge of the court respecting the plaintiff's statements in her testimony, it was at once cured by the reading of the reporter's minutes, and the correction, by the judge, of his statement. *Nauman v. Zoerhlaut*, 21 Wis., 466; *Emmons v. Dowe*, 2 id., 369; *Pilling v. Otis*, 13 id., 498; *Allerding v. Cross*, 15 id., 530; *Jenks v. The State*, 17 id., 667; *Strohn v. Railroad Co.*, 23 id., 129. 2. The plaintiff, having offered her husband as a witness generally in the action, and not to the specific matter of his agency, cannot complain that his testimony was excluded. *Beard v. Dedolph*, 29 Wis., 136. 3. All the testimony excepted to, with one exception, was offered to establish the defense of a want of consideration, and was confined by the judge, in his charge to the jury, to its bearing upon that question. And even if some of it was incompetent, the jury having found specially that the note was a forgery, its admission could not prejudice the plaintiff.

LYON, J. The testimony tending to show to whom or for whose benefit the Leshinger mortgage was paid, had a direct bearing upon the second question submitted to the jury, to wit, the question of consideration, and, as we understand the charge given by the judge to the jury, was expressly confined to that question. Hence, we think the testimony was competent. But if it was not — if the court erred in admitting it, — the error is entirely immaterial, since the jury found that the signature to the alleged note is a forgery. After such finding, the answer to the second question was entirely superfluous, and, if wrong, can harm no one.

Menk vs. Steinfort.

2. The plaintiff offered her husband as a witness generally in the cause, and not specially to testify only to matters in which he had acted as her agent. Under this general offer, it would not have been error had the court rejected him without qualification. This was ruled in *Mountain v. Fisher*, 22 Wis., 93. Hence, the qualified rejection of the husband as a witness cannot be error, even though the court may not have stated with entire accuracy the limits to which the testimony of an agent husband or wife should be confined. The learned circuit judge very properly observed that the husband was competent to testify to his acts as the agent of the plaintiff; but he further remarked that the husband could only testify to acts so done by him *when the plaintiff was not present*. We do not think this qualification can be sustained. No good reason is perceived why the husband may not testify to acts as the agent of his wife, done by him in her presence, as well as in her absence. But for the reason already stated the inaccuracy is harmless. Besides, it is a fair inference from the record that the plaintiff offered her husband to prove by him that he did not act as her agent in collecting the Leshinger mortgage. Clearly he was not a competent witness for that purpose.

3. The incorrect statement made by the judge to the jury, to the effect that the plaintiff had testified that the defendant's intestate was to reassign the Leshinger mortgage as a part of the consideration for the reconveyance of the property mentioned in the above statement of the case, is not ground for reversing the judgment. The inaccuracy was immediately discovered and corrected. It is not possible that any person of ordinary understanding could have been misled by the misstatement, when it was so promptly corrected.

The foregoing observations dispose of all the material errors alleged by the appellant adversely to her. It follows that the judgment of the circuit court should be affirmed.

By the Court.— Judgment affirmed.

Tyler vs. Burrington, Adm'x.

TYLER VS. BURRINGTON, Adm'x.

CLAIM OF WAGES by one received into defendant's family in infancy. (1) Contract to pay wages not necessarily implied; may be implied from circumstances. (2) If received as a child, must show express contract. (3) Burden of proof. (4) Express contract defined. (5) Importance of distinction between circumstances from which contract implied, and circumstantial evidence of express contract.

1. The mere fact of receiving into one's family indefinitely an infant not of kin thereto, does not imply a contract to pay wages, though such a contract may sometimes be implied from the surrounding circumstances.
2. If it appears expressly, or from the surrounding circumstances, that the infant was so received *in the relation of a child*, the law excludes an implied contract to pay wages for his services; but an *express* contract to pay such wages may be established by direct and positive evidence, or by circumstantial evidence equivalent to direct and positive. *Pellage v. Pellage*, 32 Wis., 136.
3. One who, having been received in infancy into a family not of kin to her, seeks to recover for services rendered to such family, has the *burden of proof* to show either an express contract or surrounding circumstances from which a contract can be implied; and if it appears that she was received *as a child*, she must prove an express contract for wages.
4. In such a case the mere expectation on the one part to pay, and on the other part to receive wages, never expressed by the parties to each other, does not constitute an express contract, though, if established by competent evidence, such expectations of the parties may sometimes give color to circumstances tending to show that they entered into an express contract. *Mountain v. Fisher*, 22 Wis., 93, explained.
5. In such cases, juries should receive precise instructions on the distinction between circumstances from which a contract may be implied, and circumstantial evidence of an express contract; and verdicts proceeding on a confusion of these two things should be set aside.

APPEAL from the Circuit Court for *Jefferson* County.

The county court having allowed a claim of the plaintiff against the estate of D. D. Burrington, deceased, for personal services, an appeal was taken to the circuit court. On the trial there, it appeared that in 1860 the plaintiff, then about fourteen years old, being the child of poor parents, went to

Tyler vs. Burrington, Adm'x.

live in the family of Dr. Burrington, the deceased; that she was not a blood relative of the family; that she remained in the family most of the time until the death of Dr. Burrington, a period of about ten years; that she was away some of the time on visits; that she taught school several terms; that she also attended school, and obtained most of her education during this time; that during all this period her home was at Dr. Burrington's; and that while there, she was accustomed to render services for the family about the house, and to some extent outside of the house. Testimony was introduced by the plaintiff tending to show that her services were such as are usually performed by servants, and were of considerable value; that the deceased had frequently stated to others that he intended to remunerate her for her services, and that she would receive better pay for remaining at home in his family than for teaching. The evidence for the defense tended to show that the deceased had received the plaintiff into his family agreeing to treat her as his child; and that she had enjoyed good educational advantages while there, and had been treated as one of the family.

The court instructed the jury that "if the relation existing between the claimant and the decedent, as established and maintained by themselves, was the ordinary relation of parent and child, there being no agreement between them that the claimant should receive compensation for her services, nor understanding of the parties themselves that compensation therefor should be received and paid, the claimant is not entitled to recover. * *. It was competent for the claimant and the decedent to create by agreement or understanding such relations as they saw fit in respect to services to be performed by the former for the latter, and the care and support to be given by the decedent to the claimant. But inasmuch as the claimant was not the natural child or other blood relative of the decedent, the burden of proof in this case is upon the defendant to show to your satisfaction that the relation actually existing

Tyler vs. Burrington, Adm'r.

between the claimant and the decedent was that of parent and child; otherwise it must be presumed that the claimant was to receive compensation for her services, although neither the amount nor the terms of payment were agreed upon, and even though there was no agreement at all in respect to compensation."

Verdict and judgment for the plaintiff. A new trial was denied; and defendant appealed.

J. R. Bennett, for appellant, argued, among other things, that the court erred in charging that the burden of disproving a contract lay upon the defendant. The evidence clearly shows that the relation which the deceased sustained toward the plaintiff was that of a parent; and this being the case, there was no presumption that the plaintiff was to be paid for her services. On the contrary, proof of an express contract was indispensable to the maintenance of the action. *Cooper v. Martin*, 4 East, 76; *Williams v. Hutchinson*, 5 Barb., 125; *Green v. Roberts*, 47 id., 521; *Williams v. Hutchinson*, 3 Coms., 312; *Fisher v. Fisher*, 5 Wis., 472; *Mountain v. Fisher*, 22 id., 93; *Shirley v. Bennett*, 6 Lans., 512; 38 How. Pr., 406; 19 Mo., 433. To establish a contract, the evidence must be clear, direct and positive that the relation between the parties was not the ordinary one of parent and child, or of brother and sister, but that of debtor and creditor, or of master and servant. *Hall v. Finch*, 29 Wis., 278; *Duffy v. Duffy*, 44 Pa. St., 402; *Bash v. Bash*, 9 id., 260; *Pellage v. Pellage*, 32 Wis., 136. But little weight should be given to the alleged admissions of the deceased. 1 Greenl. Ev., § 200; *Dreher v. Fitchburg*, 22 Wis., 675.

G. W. Bird, for respondent, argued that it is the settled law of this state that circumstances short of an express contract will fix liability in such a case as this, and the charge of the court was correct, citing *Fisher v. Fisher*, 5 Wis., 472; *Mountain v. Fisher*, 22 id., 93; *Hall v. Finch*, 29 id., 278; *Pellage v. Pellage*, 32 id., 136.

Tyler vs. Burrington, Adm'r.

RYAN, C. J. "The intention of the parties to any particular transaction may be gathered from their acts and deeds, in connection with surrounding circumstances, as well as from their words; and the law therefore implies from the silent language of men's conduct and actions, contracts and promises as forcible and binding as those that are made by express words, or through the medium of written memorials not under seal." Addison on Cont., 209.

When, without express contract, an infant is indefinitely taken into a family not akin to it, the surrounding circumstances must give construction to the act, and determine whether the infant is so taken as a visitor, or as a servant for wages to be earned by it, or as a boarder or pupil for nurture or tuition for compensation to the head of the family, or as a child adopted by the family in the relation of a child by blood, or in some other peculiar relation. In the absence of proof of surrounding circumstances from which a contract can be implied, it is not the province of the law to impose one upon the parties.

Fisher v. Fisher, 5 Wis., 472, was an action by an adult son who remained in his father's family and labored for him after majority, against the father, for the services of the son *sui juris*. It is said by the court that it was incumbent on the plaintiff to show that the ordinary relation of parent and child did not subsist between him and the defendant, and that there was an understanding, that is an express contract, between them that the son should be compensated for his services. This was said *obiter* in that case, but was the direct rule of decision in *Kaye v. Crawford*, 23 Wis., 320, and again in *Pellage v. Pellage*, 32 id., 136. The same rule was applied to a sister living with her brother as a member of his family. *Hall v. Finch*, 29 Wis., 278.

And the rule relating to children by blood appears to apply equally to children by adoption. *Mountain v. Fisher*, 22 Wis., 93. There the plaintiff was an infant, not of kin to

Tyler vs. Burrington, Adm'r.

the defendant, in whose family she had lived, and whom she sued for her services in his family. And this court approves the charge of the circuit court to the effect, that if the defendant had received the plaintiff into his family, and the plaintiff had entered it, to be treated as the defendant's child, without other understanding for compensation, the plaintiff could not recover. It is quite apparent, especially in the light of the later cases, that understanding there signifies, as it often does, express contract. Indeed, aside from the authority of that case, it is difficult to comprehend any reason why a child by adoption, sharing the advantages, should not share the disabilities of a child by blood; or why a child received into a family from benevolence should have a larger rule of right in it than a child in its charge by the order of nature. The frequency of such cases shows that such benevolence sometimes meets ungracious return, "through the fraud of some and the avarice and litigiousness of others." *Hall v. Finch, supra*.

The adoption of an infant into a family as a child implies no contract to pay for its services to the family; and an infant so adopted can recover for such services against the head of the family only upon express contract.

The rule of evidence by which such express contract between parent and child, by blood or by adoption, must be established, is laid down in *Pellage v. Pellage, supra*. COLE, J., says: "The rule is, that the evidence of a contract to compensate the services of a child must be positive and direct, and the contract cannot be inferred from circumstances and probabilities." And DIXON, C. J., adds by way of explanation: "It may perhaps be going too far, and be a deduction not authorized from *Hall v. Finch*, to say that, in every case of this kind, there must be positive proof of an express contract for the payment of wages or the making of pecuniary compensation for the services performed. There may undoubtedly exist other facts and circumstances, clear and unequivocal

proof of which, according to the rule of evidence held in such cases, will be equivalent to direct and positive proof of an express contract. An express contract to pay, or the relation of master and servant, may be as fairly and incontrovertibly established by circumstantial evidence as by that which is direct."

And so it is apparent, first, that when the respondent was received in her infancy into the family of the appellant's testator, the mere fact implied no contract to pay her wages for any services she might render to it, though such a contract might be implied from the surrounding circumstances; and, secondly, that if it appeared expressly or from the surrounding circumstances, that she was so received in the relation of a child, the law excludes an implied contract to pay her wages for her services; but that she could recover upon an express contract to pay her, which might be established by direct and positive evidence or by circumstantial evidence equivalent to direct and positive. In what relation she entered the testator's family, was therefore the first question of fact to be determined. If as a servant, there was an implied contract of the testator to pay her wages *quantum meruit*. If as a child, there was no implied contract to pay her wages; and she could recover them only upon express contract with the testator, which it was incumbent upon her to establish.

The learned judge of the court below appears to have been misled into a distinction, not sanctioned by the rule, between a child by blood and a child by adoption. And so, in his view, because the respondent was not of kin to the testator, there was a presumption that she was taken into the testator's family under a contract to pay her for her services to it, and the *onus* of disproving such a contract lay with the appellant.

So the jury was instructed. This is error. The *onus probandi* of her right to recover was on the respondent. The mere fact of her being taken into the testator's family did

Tyler vs. Burrington, Adm'x.

not establish her right. Failing to prove an express contract, it rested with her to establish an implied contract by the surrounding circumstances. If the surrounding circumstances showed that she was taken into the testator's family as a child, then it rested with her to prove an express contract with the testator that he should pay her wages.

And mere expectation on his part to pay and on her part to receive wages, would not constitute an express contract, unless by mutual expression of the expectation it became consensual. Resting in the several minds of the parties, unexpressed to each other, independent and changeable, their expectations would tend rather to rebut than to establish an express contract. For upon contract expressly made, expectation would cease. In such cases expectation looks rather to an implied than an express contract. If established by competent evidence, as entering into the *res gestæ*, such expectations of these parties might give color to circumstances tending to show that they ripened into a mutual understanding, an express contract. This is apparently the sense in which the rather loose word is used in *Mountain v. Fisher*, as the context of the opinion shows, and is the construction put upon it in all the later cases; especially in *Pellage v. Pellage*, both opinions being by my brother COLE, who quite concurs in my view of them.

And, though the express contract required by the rule may be established by circumstantial evidence, vague, doubtful, ambiguous circumstances are insufficient for that purpose; but only such circumstances, clearly proved, as are equivalent to direct and positive proof. *Pellage v. Pellage*. And, as peculiarly applicable here, we again quote from GIBSON, C. J., in *Bash v. Bash*, 9 Pa. St., 260, cited in *Hall v. Finch*. "Every sane man must be allowed to make his own contract, as well as his own will. And to prevent jurors from making it for him according to their peculiar notions of fitness and propriety, we have held that the evidence of a contract to

Tyler vs. Burrington, Adm'r.

compensate the services of a child must be positive and direct. But evidence, clear and satisfactory in the estimation of a jury, may be neither. It may be no more than presumptive and inferential; and if that were sufficient, it would be easy to see how every case of the sort would go. To an unpracticed eye, loose and inconsiderate expressions...and presumptions or probabilities resting on circumstances, may seem perfectly clear and satisfactory; but they constitute not the proof by which such a contract is to be established in conformity to the judgments of this court." So far as this passage appears to exclude circumstantial evidence of an express contract, we do not adopt it. But we regard it, as indeed the whole opinion from which it is taken, as full of instruction in the case before us. It is especially suggestive of the danger, in such cases, of confounding circumstances from which a contract might be implied, with circumstantial evidence of an express contract; of the necessity of precise instruction to juries on the distinction; and of the duty of courts to set aside verdicts proceeding on such a confusion.

In this case, it is equally the duty of the court to support an express contract, if *bona fide* made and clearly established, in favor of the respondent, against her benefactor, the testator's estate, and to protect his estate from a contract to be implied after his death from his benevolence to the respondent during his life.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded for a new trial.

By the Court.—So ordered.

Scheike vs. Johnson and others.

SCHEIKE VS. JOHNSON and others.

Reversal of Judgment.

A judgment will not be reversed because some proposition in the judge's charge to the jury was not strictly accurate, if upon the whole charge the jury could not have been misled as to the law applicable to the case presented by the appellant's evidence.

APPEAL from the Circuit Court for *Jefferson* County.

This was an action under the statute relating to mills and mill dams, to recover damages for flowing plaintiff's land, and to abate the dam. The answer, among other defenses, set up the statute of limitations in bar.

The testimony on the part of the plaintiff tended to show a greater flowage in the years 1873 and 1874 than prior to that time; while that of the defendant tended to establish a flowage to an equal or greater extent in previous years, and for a period ranging from twelve to twenty years prior to the commencement of the action.

The exception taken to the charge of the court, comprising the point upon which this appeal was argued, and so much of the charge as is necessary to an understanding of the case, appear in the opinion.

The defendants had a verdict and judgment, and the plaintiff appealed.

J. M. Gillet, for the appellant, argued that the rule laid down by the court in its charge required the plaintiff to show a flowage greater than that existing and exercised ten years prior to the commencement of the action, regardless of any recession of the waters during the interval, whereas defendants' rights were limited by the permanent flowage during the ten years; and that it prevented a recovery as to any portion of the land flowed within the three years prior to the action, in case a part had been flowed for ten years, which was erroneous.

G. W. Bird, for the respondents, as to the correctness of the charge, cited *Tay. Stats.*, 812, 814, §§ 3, 4, 13, 15, 16, 17, and 818, § 42; *Rooker v. Perkins*, 14 Wis., 79; *Haag v. Delorme*, 30 id., 591; *Ruehl v. Voight*, 28 id., 153; *Janssen v. Lammers*, 29 id., 88. He also contended that the exceptions were not sufficiently specific to present any question for review, citing *Morse v. Gilman*, 18 Wis., 373; *Tomlinson v. Wallace*, 16 id., 225, and cases cited in note.

COLE, J. On the argument, all exceptions to the rulings of the court on the trial were abandoned except those taken to some portions of the charge. Exceptions were taken to the charge relating to the defense of the statute of limitations. Upon that point the court, among other things, instructed the jury that if the plaintiff's lands or some portion of them were flowed by reason of the dam for ten years next before the commencement of the action, to the same degree and uniform height that they were at the commencement of the action, and since, then the verdict must be for the defendants.

The criticism upon this charge is, that if the plaintiff had only ten acres flowed at the time the suit was brought, but had had forty acres flowed three years before that time, under this rule of the court the ten years flowing of the ten acres would bar a recovery for the injury to the forty acres flowed three years before the action was commenced, and subsequently, though the forty acres might not have been actually flowed for the full period required by the statute of limitations. The whole charge must be construed together and with reference to the issues and evidence in the cause. Under such a rule of interpretation, the charge seems to be sufficiently accurate and precise. The complaint was for the flowing and injury done to ninety-three acres of land, or some part thereof, belonging to the plaintiff. An effort was made on the trial by the plaintiff to prove that more of his land was flowed in the years 1873 and 1874 than had been

Scheike vs. Johnson and others.

prior to that time. Indeed the plaintiff himself testified that in 1871 a very small part of his land was below water, and that the portion flowed "was around the river, not much outside." So that really no such state of facts existed or was attempted to be proven as is supposed in the illustration made use of to show the incorrectness of this part of the charge. But besides, in immediate connection with this paragraph of the charge criticised, the court told the jury that if they found "from the testimony that the plaintiff's land or some part of it is flowed or otherwise injured by the dam, then, to make the statute of limitations of ten years available as a defense to the defendants, they must show that the water has been kept up by the dam to the same uniform height as that complained of as being increased flowage, for a period of ten years or more next preceding the commencement of the action; and the defendants are bound to make such showing by a preponderance of testimony. If the plaintiff's land was flowed by reason of the dam ten years next before the commencement of the action, he is not entitled to recover, unless there has been increased flowage within that time. * * To entitle the plaintiff to recover in case you shall find that his land or some part of it is flowed or otherwise injured by the dam, it is not necessary that the dam should have been the sole cause of the increased flowage or injury; for though there may have been other obstructions, yet if you shall find from the testimony that but for the dam there would have been no increase of water on the lands, or that by reason of the dam the flowage or injury has been greater than it was before, the dam is to be deemed a cause of the increased flowage or injury. If within ten years next preceding the commencement of this action, by reason of increase in the height of the dam or because of any new obstruction, the dam has caused more of the plaintiff's land to be flowed uniformly or otherwise injured, for such increase the defendants are liable for damages as though no

Schattschneider vs. Johnson and others.

right to keep up the water had ever been acquired at all." These quotations are sufficient to show the general import of the charge; and when the charge is considered with reference to the evidence, it is unobjectionable. The criticism passed upon it, or upon portions of it, seems to us over nice and refined, and fails to point out any error which could have misled the jury. Of course, when the plaintiff showed that any portion of his land was flowed or injured by the defendants' dam, it was incumbent on them to establish a prescriptive right thus to flow it. This was the issue in the case, and it appears to have been submitted upon the evidence, with no misdirection as to the law.

By the Court.—The judgment of the circuit court is affirmed.

SCHATTSCHNEIDER VS. JOHNSON and others.

CHANGE OF VENUE. (1) *Appealable order. Res adjudicata. Denial of one motion does not bar a second.* (2) *Discretion of trial court as to change of venue for prejudice of the people of the county.*

1. An order refusing to change the place of trial on account of the prejudice of the people of the county in which the action was brought, is appealable, and it may also be reviewed on appeal from the final judgment; and one such order made in an action does not bar a second like motion by the same party on the same ground. *Hackett v. Carter*, 38 Wis., 394.
2. The granting of a change of venue in such cases rests in the sound discretion of the court, acting upon its own knowledge and observation as well as upon the proofs presented; and its decision will not be reversed except for an abuse of discretion.

APPEAL from the Circuit Court for *Jefferson* County.

J. M. Gillet, for appellant:

1. The order was not appealable. *Baldwin v. Marygold*, 2 Wis., 419; *Rimes v. Boyd*, 7 id., 155; *Runals v. Brown*, 11

Schattschneider vs. Johnson and others.

id., 186; *Western Bank of Scotland v. Tallman*, 15 id., 92; 22 id., 99. 2. The question was not *res adjudicata* by the denial of the former motion.

G. W. Bird, for respondent:

1. The question was *res adjudicata* by the denial of the former motion, made on the same grounds. *Cothren v. Connaughton*, 24 Wis., 134; *Kabe v. The Eagle*, 25 id., 108; *Moll v. Benckler*, 28 id., 611; *Branger v. Buttrick*, id., 450; *Mercein v. The People*, 25 Wend., 63; *Sup'rs v. Briggs*, 2 Denio, 26; *White v. Coatsworth*, 2 Seld., 137; *In re Livingston*, 34 N. Y., 555; *Pierce v. Kneeland*, 9 Wis., 23; *Hill v. Hoover*, id., 15; *Allen v. Gibbs*, 12 Wend., 202. But if the doctrine of *res adjudicata* were not applicable to the motion, it could not be renewed without first obtaining *leave of the court*. *Mitchell v. Allen*, 12 Wend., 290; *Dollfus v. Froesch*, 5 Hill, 493; *Belmont v. R. R. Co.*, 52 Barb., 637; *Cornwith v. Bank*, 11 Wis., 430. 2. A change of venue on the ground here assigned could properly be granted only upon the fact being clearly established to the satisfaction of the court. *Tay. Stats.*, 1425, § 14; *R. S.*, 1055; *Hungerford v. Cushing*, 2 Wis., 397; *Frank v. Avery*, 21 id., 166. The determination of the court below will not be disturbed unless there was an abuse of its discretion. 24 Wis., 533; 30 id., 129; 31 id., 512; 33 id., 413; *Lego v. Shaw*, 38 id., 401.

LYON, J. This appeal is from an order of the circuit court denying the motion of the plaintiff for a change of the place of trial of the action because of the alleged undue influence of the defendants over the people of the county in which the action is pending, and because of the prejudice of such people against the plaintiff. At a previous term of the court a similar motion had been made by the plaintiff, and denied. Affidavits were read in support of and against the last motion. These were quite voluminous, and it will serve no useful purpose to set them out at length, or to attempt to state the sub-

stance of them. It is sufficient to say, that, in our opinion, those read in support of the motion, considered alone, are entirely sufficient to justify, if not to require, a change of the place of trial. But the affidavits read in opposition to the motion materially weaken the force of those read to support it. Yet, considering all of the affidavits, we are inclined to think the place of trial ought to have been changed. Certainly, had the motion been granted, this court would be slow to interfere with the ruling.

It must be remembered, however, that this is a matter which rests in the sound discretion of the circuit court, and nothing short of an abuse of such discretion will justify our interposition.

We cannot say that there was an abuse of discretion in the present case. In reaching the conclusion that the motion ought to be denied, the learned circuit judge may have been influenced by his personal observation and knowledge, to which he might properly resort. *Jackman Will Case*, 27 Wis., 409; *Lego v. Shaw*, 38 id., 401.

The former order denying a like motion is no bar to the last motion. This is one of the cases to which the doctrine of *res adjudicata* is not applicable. The order refusing to change the place of trial is appealable, and it may also be reviewed on an appeal from the final judgment in the action. *Haas v. Weinhausen*, 30 Wis., 326. Hence the case is ruled by *Hackett v. Carter*, 38 id., 394. The motion may be renewed at the pleasure of the plaintiff.

By the Court. — Order affirmed. •

Van Slyke vs. Trempealeau County Farmers' Mutual Fire Ins. Co.

VAN SLYKE VS. TREMPÉALEAU COUNTY FARMERS' MUTUAL
FIRE INSURANCE COMPANY.

CONSTITUTIONAL LAW. TRIAL BY NON JUDGE. (1) *Limitation of legislative power as to conferring judicial jurisdiction.* (2) *Act permitting trial by a member of the bar of this court in certain cases, void.* (3) *Presumption from record in such a case.* (4) *Judgments of judges de facto, distinguished.* (5) *Reversal of judgment for mistrial.*

CHANGE OF VENUE. (6) *How question of judge's prejudice to be raised.*

1. The constitution of this state having vested all judicial jurisdiction in courts and justices of the peace, and provided for the election of judges of all courts, the legislature can confer no judicial jurisdiction on other officers or persons, excepting power not exceeding that of a circuit judge at chambers, on court commissioners.
2. Ch. 69, Laws of 1870, which authorizes parties to avoid a change of venue for prejudice of the circuit judge, by stipulating that a member of the bar of this court shall act as judge in the case, with all the powers and duties of a circuit judge, is void.
3. On appeal from a judgment signed by the clerk, where the record here shows that on the trial of the cause in the court below the judge of that court left the bench, and that his place was assumed by another person, a member of the bar of this court, but not a judge, who tried the cause, and upon whose consideration the judgment was rendered, this court cannot *presume* that such judgment rests upon a proper trial of the issue, but must treat the proceeding as *coram non judge*, and the judgment as void.
4. *In re Boyle*, 9 Wis., 264; *State v. Bloom*, 17 id., 521; and *Laver v. McGlachlin*, 28 id., 361, in which the court upheld the judgments of judges *de facto*, and not *de jure*, distinguished from this case, in which the person who tried the cause was not in possession of the office of judge, and did not claim it.
5. The judgment, having proceeded upon a mistrial, and not being a proper judgment of the court below, whether it is void or voidable, must be reversed.
6. Whether the petition of a party to an action, representing the judge to be related to the parties and necessarily and insensibly prejudiced in the case, but not praying a change of venue, properly raises the question of prejudice, is not here decided.

APPEAL from the Circuit Court for Trempealeau County.

Van Slyke vs. Trempealeau County Farmers' Mutual Fire Ins. Co.

Action for a loss by fire, under an alleged agreement for insurance. Plaintiff presented to the court a petition representing that the judge, by reason of relationship to the parties, was insensibly prejudiced in the case; whereupon the parties stipulated for a trial before John J. Cole, Esq., a member of the bar of the supreme court.*

The bill of exceptions states that the action "came on for trial before John J. Cole, Esq., a counselor of the supreme court of this state, who sat as judge to try the case by stipulation of the parties, and a jury, at the April term of the court," etc.; and it is signed "JOHN J. COLE, Counselor, acting as Judge."

The plaintiff had a verdict and judgment; and the defendant appealed.

A. W. Newman, for appellant.

G. F. Freeman, for respondent.

RYAN, C. J. Mere imputation of prejudice to the circuit judge, made in proper time by either party to a civil action, entitles the party making it to a change of the venue. Ch. 123, sec. 8, R. S.; ch. 206 of 1862. With a view, doubtless, of mitigating such inconvenience, ch. 69 of 1870 authorizes the parties to avoid change of the venue on that ground, by stipulating that a member of the bar of this court shall act as judge in the cause, with all the powers and duties of the circuit judge.

Such a statute might work well. But we cannot consider

* Ch. 69, Laws of 1870, amended the statute directing a change of venue upon petition of a party showing prejudice of the judge, by adding thereto the following: "Unless the parties to said action, by themselves or their attorneys, shall make and file with the clerk of the court in which said cause is pending, a written stipulation agreeing that some member of the bar of the supreme court of Wisconsin act as judge in said cause; and in that case the place of trial of such action shall not be changed, but the party so agreed upon may act as judge in said cause, and shall have all the powers and perform all the duties of the judge of said court in said cause."

Van Slyke vs. Trempealeau County Farmers' Mutual Fire Ins. Co.

it competent under the constitution. That instrument vests all judicial jurisdiction in courts and justices of the peace, and provides for the election of judges of all courts; and the legislature can confer none on other officers or persons, excepting power not exceeding that of a circuit judge at chambers, on certain officers now called court commissioners. *Att'y Gen. v. McDonald*, 3 Wis., 805; *Gough v. Dorsey*, 27 id., 119; *Conroe v. Bull*, 7 id., 408. So manifest is this intent to distribute and restrict the exercise of judicial authority by express grant, that the framers of the constitution deemed it necessary to give express authority to the judge of one circuit to hold court in another. The statute in question was well intended, but obviously overlooked the constitutional restriction. It seems too manifest for discussion that, under the constitution, no one can hold a circuit court but a circuit judge. Certainly not a court commissioner, who can only act as circuit judge at chambers. *A fortiori*, not one holding no judicial office: a gentleman of the bar assuming no judicial office, but merely chosen by the parties to an action to act as a sort of judicial arbitrator in it. If the statute before us could be upheld, we do not see why one could not which should assume to give to the parties, in all actions, in all courts, power to stipulate the judges off the bench, and private persons into their seats. Judicial power is one of the attributes of sovereignty, necessarily delegated in its exercise. The constitution does not leave the delegation loose at the discretion of the legislature. It delegates the judicial power to constitutional courts, to be held by constitutional judges. And these constitutional judges take no power from the constitution, can take none from the legislature, to subdelegate their judicial functions. See the instructive case on this subject of *Cohen v. Hoff*, 3 Brevard, 500.

The respondent petitioned the court below, representing the judge to be related to the parties and necessarily and insensibly prejudiced in the case, but not praying change of the

Van Slyke vs. Trempealeau County Farmers' Mutual Fire Ins. Co.

venue. We give no opinion whether the petition properly raised the question of prejudice. The learned judge himself evidently thought that it did.

The parties thereupon filed a stipulation that Mr. Cole, a member of the bar of this court, should act as judge on the trial of the cause; and the court below made an order, reciting the petition for prejudice, and ordering the cause to be tried before Mr. Cole as judge of the court, in accordance with the statute.

The trial appears to have taken place before Mr. Cole and a jury, who found for the respondent. There is in the record what purports to be a bill of exceptions and an order refusing a new trial, signed by Mr. Cole. The judgment is signed by the clerk, with a statement at its head that Mr. Cole sat as judge on the trial.

We cannot look into the bill of exceptions or consider the order denying a new trial, because both are unofficial and devoid of judicial authority. They are as any other irrelevant papers finding their way by accident or mistake into the record of a cause. And the only question for us is, whether we should hold the judgment supported by a presumption that it rests upon a proper trial of the issue, or should consider it as rendered by Mr. COLE, and therefore not properly the judgment of the court below.

We cannot doubt that the latter is the proper view. All judgments are by the consideration of the court. *Judicia in deliberationibus maturescunt*. The judicial mind goes to all judgments, either by particular consideration or by general consideration established by rule. There must be actual or constructive consideration of the judge of the court. *Judicium est quasi juris dictum*. And it is the voice of the judge only which is the voice of the law. *Judex est lex loquens*. And we cannot close our eyes to the truth so patent in this record, that, in compliance with the statute before us, the learned judge of the court below abdicated his judicial office

Van Slyke vs. Trempealeau County Farmers' Mutual Fire Ins. Co.

and function, for this cause, in favor of Mr. COLE. And it was by consideration of Mr. COLE, not of the circuit judge, that this judgment went. Indeed, with the suggestion uncontroverted that the judge was related to the parties, we do not see how he could well sit in the cause. R. S., ch. 123, sec. 7. Be that as it may, the record discloses that he left the bench and Mr. COLE took his place upon it, assumed his duties in the cause, and tried it; and that upon Mr. COLE's *quasi* judicial consideration and voice only, this judgment was rendered. It was literally *coram non judice*.

This phrase is commonly applied directly to the court itself. But it applies, in its proper sense, to a court not having jurisdiction of a matter, only because the judge is, *quoad hoc*, not a judge. And the judge *de jure et de facto* of a court not having jurisdiction of a cause in it, is, for that cause, like a private person assuming to exercise judicial functions over it. "When the court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, . . . and therefore the said rule . . . *qui jussu judicii aliquod fecerit* (but when he has no jurisdiction, *non est judex*) *non videtur dolo malo fecisse, quia parere necesse est*, was well allowed, but it is not of necessity to obey him who is not judge of the cause, no more than it is a mere stranger, for the rule is, *judicium a non suo judice datum nullius est momenti*." *Marshalsea case*, 10 Rep., 68 b, 76 a; cited and approved in *Taylor v. Clemson*, 2 Ad. & E., N. S., 978. "It is the same as though there was no court. It is *coram non judice*." *Grumon v. Raymond*, 1 Conn., 40. So, because the jurisdiction of a court can be exercised only by the judge *de facto* of the court, the judge of a court not having jurisdiction is likened to a stranger assuming to exercise the jurisdiction of a court having it; the proceeding in both cases being *coram non judice*. The rule as given in Fleta, following Bracton, applies very closely to this case. It is there said, in substance, that no one can proceed judicially to whom regular jurisdiction has not

 Van Slyke vs. Trempealeau County Farmers' Mutual Fire Ins. Co.

been delegated by the king himself; and that no other can control the power of the county or punish for contempt (contumacy) except one on whom judicial power has been conferred, not by a judge, but by the king himself, for that even a *praetor* could not substitute judges under him, because the judgments of such would be of no effect.* *Sententia enim a non iudice lata nemini debet nocere.* Fleta, book 6, ch. 6., secs. 6, 7. So, we are told by Coke that even when the king personally sat in the King's Bench, "the judicature only belongeth to the judges of that court;" and that they "have supreme authority, the king himself sitting there as the law intends." And he calls them sovereign justices. 4 Inst., 73. If the king himself, sitting in his own court, held *coram ipso rege*, could not exercise its judicial power, surely no private subject of his could. "*Judicium* is derived *a jure et dicto*, *et est quasi juris dictum*" (3 Inst., 210); and it is only the appointed judge who can speak the authoritative word of the law. Mr. Cole might pronounce the law as well as any of us; it is not that he wanted ability, but that he wanted authority. His voice could not utter *juris dictum*, *quia non est iudex*. "He was not judge *de jure* or *de facto*, and therefore all his acts as such are void." *Frame v. Trebble*, 1 J. J. Marsh., 205. See Broom's Leg. Max., 69.

There is a quaint relish of poetry in the way of putting the sovereign delegation of judicial function in *Martin v. Marshall*, Hob., 63. "All kingdoms in their constitution are with the power of justice, both according to the rule of law and equity; both which, being in the king as sovereign, were after settled in several courts; as the light, being first made by God, was after settled in the great bodies, the sun and

* Nullus sumum potest cui jurisdictio ordinaria per ipsum Reg' non delegatur, nec alius cohercionem com' habebit, nec contumaciam punire poterit quis nisi ipse cui datur judic' autoritas et non per judicem delegatum sed per ipsum Reg'; Praetor enim judic' sibi non poterit subdelegare, quia sententiae talis nullius sunt effectus.

Van Slyke vs. Trempealeau County Farmers' Mutual Fire Ins. Co.

moon. But that part of equity being opposite to regular law, and in a manner an arbitrary disposition, is still administered by the king himself and his chancellor, in his name *ab initio*, as a special trust committed to the king, and not by him to be committed to any other." With all deference to that great judge, it might perhaps be suggested that here is a slight inaccuracy of constitutional law, celestial and terrestrial. For there does not appear to be any radical distinction in the delegation of equitable jurisdiction and of legal jurisdiction. Equity never rested in mere discretion of king or chancellor. And it is certainly contrary to the received notion, that the moon shines as a luminary *per se*, like the sun. Taking the sun and moon according to the common acceptation, and following Hobart's metaphor, the circuit judge might be likened to the sun of the court below, in this cause, and Mr. COLE to the moon, after the fashion of a juridical depute in Scot's law, shining with delegated jurisdiction. But the constitution mars the comparison. For by the astronomical constitution the sun appears to take power to delegate his functions of lighting the world; while the state constitution tolerates no such delegation, and appoints a sun only, without any moon, as luminary of the circuit court, whose "gladsome light of jurisprudence" must be sunshine only, not moonshine. Commissioners, masters, referees, and like judicial subordinates, may share in judicial labor and lighten it; but they cannot change places with the judge on the bench or share in the final judgments of the court.

We do not forget that this court has upheld the judgments of judges *de facto*, not *de jure*, in *Re Boyle*, 9 Wis., 264; *State v. Bloom*, 17 id., 521; *Laver v. McGlachlin*, 28 id., 364. But in all these cases the person acting as judge held the office under color of title. So the court says in *Re Boyle*: "Every person assuming to exercise the authority of an officer, does not thereby necessarily make himself an officer *de facto*. But when it appears that the person exercising the powers of

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

an office, is in by such a color of right, and that he has such possession of the office, as makes him an officer *de facto*, then his acts as to third persons are valid, and his right to hold the office can only be inquired into in some direct proceeding for that purpose." Here, Mr. Cole was not in possession of the office of judge, and did not claim it. He only accepted a delegation of its functions *pro hac vice*, acting for the circuit judge in some sort as a *judex pedaneus* of the Roman law. And those cases are quite in accord with this.

The judgment plainly proceeded upon a mistrial, which cannot support it; and the judgment itself is plainly not a proper judgment of the court below. Whether void or voidable, it should be reversed. *Sayles v. Davis*, 20 Wis., 302; *Hays v. Lewis*, 21 id., 663.

By the Court.—The judgment of the court below is reversed, and the cause remanded for trial according to law.

HULL, Adm'r, vs. THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

LIFE INSURANCE. *Construction of policy: Forfeiture clause: Premium notes: Application of dividends.*

1. A policy of life insurance recites that in consideration of the annual premium therein stipulated, consisting of an annual cash premium, and an annual loan note, with interest, to be paid and given during ten years next after the date of the policy, the company assured the life of plaintiff's intestate to a certain amount for the term of his natural life. It declares that at each distribution of the surplus after its date, a due proportion of such surplus on each year's business during the continuance of the policy, will be returned to the assured, and that if default shall be made in the payment of any premium, the company will pay as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default; but that in order to secure such proportion, "all premium notes must be taken up,

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

or the interest thereon be paid annually in cash, on the date of the annual maturity of the premium or within three months thereafter, until the notes are cancelled by returns of the surplus, or the whole policy will be forfeited, unless one or more annual payments have been made in full, by cash payment or by application of the dividend." One of the conditions of the policy was, that if the premiums, *or the interest upon any note given therefor*, should not be paid on the day named for their payment, "the company should not be liable for the payment of the whole sum assured, *but only upon such part thereof as is stipulated above*," and the remainder should cease and determine. There was indorsed on the policy this statement: "At the third annual renewal, the dividend of the first year will be due, and on the cash policies can be applied as cash towards the payment of the third year's premium, * * and on note policies will be applied first to pay the unpaid interest on the loan notes, and then to the notes themselves. * * THIS POLICY IS NONFORFEITABLE. Each complete yearly payment secures its proportion of the policy." The loan note contains a promise by the assured to pay the amount therein named with interest, "*which interest shall be paid annually or the policy be forfeited.*" The assured paid the cash premiums for three years, and gave in each of said years his annual loan note as required; but afterwards made default in a payment due September 29, 1873, by reason of which the policy is admitted to have lapsed as to seven-tenths of its amount. On the 29th of March, 1874, there was due the company as interest on outstanding loan notes \$24.80; but on the same day there was due the assured from the company \$51.15, dividend earned for the year 1872. The assured died December 14, 1874. *Held*, that the company is liable to pay to the administrator three-tenths of the amount insured.

2. Forfeitures are only enforced when it appears that this is the plain intent and meaning of the contract; and the words of a policy must be construed most strongly against the insurer; and if the policy contains repugnant conditions, the court must enforce those which are in favor of the assured and will prevent a forfeiture.
3. By the terms of the policy, the assured was clearly entitled to have the dividend which fell due on the day when interest accrued on his loan note, applied first to the payment of such interest; and even if a forfeiture would have resulted on the failure to pay such interest (a point not decided), there was none in this case.
4. Dividends due the insured are *cash*, and there is nothing in the policy which justifies the company in refusing to apply them in payment of interest on premium notes in such cases.

APPEAL from the Circuit Court for *Fond du Lac* County.

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

Action upon a policy of life insurance, issued to plaintiff's intestate, Alfred Hull. The terms and conditions of the policy, so far as they have any bearing upon the case, are stated at length in the opinion of the court.

The policy was issued March 29, 1870, upon the ten-year-payment plan, premiums payable annually (subsequently changed to semi-annually), partly in cash and partly by premium note. It was claimed on the part of the defense, that the policy had lapsed as to seven-tenths by the nonpayment of the semi-annual premium due September 29, 1873; and that the balance was forfeited by nonpayment of the interest maturing March 29, 1874, upon the first loan or premium note. The company, after the default in paying the semi-annual premium due in September, 1873, indorsed a dividend, declared upon the earnings of the year 1872, on the note of the assured, but erased the indorsement upon his failing (as the company claims) to pay in cash the interest upon such note maturing in March, 1874.

All the remaining facts, material to the case, will be found in the opinion.

Judgment for the plaintiff for the sum of \$1,216.75, being three-tenths of the policy, less the amount of the unpaid loan notes. The defendant appealed.

Geo. H. Noyes, for appellant, upon the point that a failure to pay the premium, in accordance with the terms of the policy, worked a forfeiture thereof, where the policy so provided, and that the same result followed a nonpayment of a premium note or the interest or an installment due thereon, cited *Howell v. Life Ins. Co.*, 44 N. Y., 276; *Ruse v. Life Ins. Co.*, 23 id., 506; *Mut. Ben. Life Ins. Co. v. Ruse*, 8 Ga., 534; *Shaw v. Life Ins. Co.*, 103 Mass., 254; *Catoir v. Life Ins. & Trust Co.*, 4 Vroom, 487; *Tait v. Life Ins. Co.*, 2 Ins. L. J., 863; *Robert v. Life Ins. Co.*, 1 Disney, 355; 2 id., 106; *Pitt v. Life Ins. Co.*, 100 Mass., 500; *Baker v. Life Ins. Co.*, 43 N. Y., 283; *Russum v. Life Ins. Co.*, Sup. Ct.

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

Mo., decided Feb. 15, 1876; *Patch v. Life Ins. Co.*, 44 Vt., 481; *Mut. Ben. Life Ins. Co. v. French*, 2 Cin. Sup. Ct. R., 321; 2 Cent. L. J., 618; *Mut. Life Ins. Co. v. Young*, 11 Alb. L. J., 364; *Worthington v. Life Ins. Co.*, 4 Ins. L. J., 269; *Dillard v. Life Ins. Co.*, 44 Ga., 119. He further argued that, by the terms of the policy, the assured, in order to secure a proportional payment upon it when partially lapsed, was required either to take up all the premium notes, or pay the interest *in cash*, and that a payment by application of dividends would not answer, as the two methods of payment were clearly distinguished by the terms of the policy; that the assured could not claim such application in this case, because, by the terms of the policy, to entitle him to any dividend, there must have been a policy in force when it became due him, and, his policy having lapsed, no dividend had accrued, and none could accrue until payment of the interest; that the uniform rule and practice of the company had been, in case of lapsed policies, where notes were outstanding, to require the interest to be paid in cash, and to apply the dividends uniformly to the payment of the principal of the notes; that the provision indorsed on the policy, that "at the third annual renewal, the dividend of the first year will be due, and on note policies will be applied first to pay the unpaid interest on loan notes, and then to the notes themselves," was obviously restricted to full policies, and had no reference to those partially lapsed; and that any other construction would defeat the theory upon which the entire system of extending credit by insurance companies for a portion of the premium is based, and would render the notes wholly worthless, and require the company to carry a risk for which it received no compensation.

D. Babcock, for respondent, contended that a complete annual premium consisted of the cash paid and note given each year; and that, three such payments having been made, the policy, as to three-tenths thereof, was nonforfeitable (*Bliss*

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

on Life Ins., 273, 284; May on Ins., § 345; *New England Mut. Life Ins. Co. v. Hasbrook*, 32 Ind., 447; *McAllister v. Ins. Co.*, 101 Mass., 558; *Mowry v. Ins. Co.*, 9 R. I., 346; *Baker v. Life Ins. Co.*, 6 Abb., N. S., 144; *Dutcher's case*, 2 Cent. L. J., 153; *Hodsdon v. Guardian Life*, 1 Big. L. & A. Ins. R., 218; 4 id., 670); that the condition as to the payment of interest in cash was fulfilled when the company indorsed the dividend upon the note; that, as the assured was a member of the company, it was bound so to apply the dividend as to protect his interest from forfeiture, and that courts look upon forfeitures with disfavor (*Fröhlich v. Life Ins. Co.*, 2 Big., 81; *Mut. Ben. Life Ins. Co. v. French*, 4 id., 369; *Ohde's case*, 2 Cent. L. J., No. 36, Sept. 3, 1875; *Grigsby's case*, id., Feb. 19, 1875; Story's Eq. Jur., §§ 1314, 1316); that the company was estopped from claiming that the policy was forfeited for nonpayment of the interest, on the ground that, by its own express agreement, the loan notes were only to be paid by the dividends or by deduction from the policy when it matured (*Dutcher v. Life Ins. Co.*, 4 Big., 665; *Grigsby v. Life Ins. Co.*, 2 Cent. L. J., No. 8, p. 123; 4 Big., 633; *Smith v. Life Ins. Co.*, Sup. Ct. of N. Y., unreported; *Ohde's case*, *supra*); and that that construction should be adopted which is most favorable to the insured, where there is any uncertainty, and strictly against the insurer. Bliss on Ins., 656.

COLE, J. The company defends upon the ground that in consequence of the nonpayment of the interest due on the notes given by the insured for premiums, the policy became forfeited. The action was to recover three-tenths of the sum named in the policy, less the amount of the outstanding loan notes. The policy was on the ten-year-payment plan, and bore date March 29, 1870. The insured paid the stipulated part of the cash premiums for the years 1870, 1871 and 1872, and gave in each of said years his annual loan note, as pro-

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

vided by the terms of the policy. On the 29th day of March, 1873, when the time for the fourth annual renewal came, the payment of the premium was changed from annual to semi-annual payments; and it was admitted that on the 29th of September, 1873, the policy lapsed as to seven-tenths by reason of the default in the payment of the premium then due. There is a little obscurity in the evidence upon the point, but the fact is conceded that on the 29th day of March, 1874, there was due the company as interest on the outstanding loan notes, the sum of \$24.80. On that day there was due the insured from the company the sum of \$51.15, dividend earned on the policy for the year 1872. The insured died on the 14th of December, 1874. The real question presented for consideration is: Did the policy lapse and become forfeited as to the three-tenths of the original amount by reason of the failure of the insured to pay the interest on the premium notes on the 29th day of March, 1874, upon this state of facts? An answer to this inquiry necessarily requires a reference to several clauses in the policy.

In the first place, the policy recites that in consideration of the representations made in the application therefor, and of the premium in advance as therein stipulated, consisting of the annual cash premium of \$179.55, to be paid at or before noon on or before the 29th day of March, and of an annual loan note, with interest, of \$89.75, during the first ten years of the continuance of the policy, the company assured the life of Alfred Hull for the benefit of himself, in the amount of \$5,000, for the term of his natural life. After a provision for the payment of the amount of the assurance when the policy matures, follow these clauses: "At each distribution of the surplus, after two years from the date hereof, a due proportion of such surplus on each and every year's business during the continuance of this policy will be returned to the said assured. And the said company further promises and agrees that, if default shall be made in the payment of any premium, it will

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

pay, as above agreed, as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default. But in order to secure such proportion of the policy, all premium notes must be taken up, or the interest thereon be paid annually in cash, on the date of the annual maturity of the premium, or within three months thereafter, until the notes are cancelled by returns of the surplus, or the whole policy will be forfeited, unless one or more annual payments have been made in full, by cash payment or by application of the dividend." Among the conditions upon which the policy was issued and accepted, was this: "8d. If the said premiums, or the interest upon any note given for the premiums, shall not be paid on or before the days above mentioned for the payment thereof, at the office of the company or to the agents when they produce receipts signed by the president or secretary, then, and in every such case, the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine." On the policy was indorsed this statement, with other matters not material to be noticed: "At the third annual renewal, the dividend of the first year will be due, and on cash policies can be applied *as cash*, toward the payment of the third year's premiums, or if the party insured is, at the time, in good health, may be used for purchasing full paid additional nonforfeiting insurance, due and payable with this policy at death, or temporary insurance, expiring at the end of one year, and due and payable in case of death during the year; and on note policies will be applied first to pay the unpaid interest on loan notes, and then to the notes themselves. Loan notes are not assessable, and are to be paid only by the dividends, or by deduction from the policy when it matures, if any are then outstanding. * * * This policy is non-forfeitable. Each complete yearly payment secures its proportion of the policy. * * * If payments of premiums

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

are at any time discontinued, this policy is full paid for an amount equal to as many proportionate parts of the original insurance as there have been complete annual premiums paid at the time of such default."

The loan note contains a promise by the assured to pay the amount therein named with seven per cent. interest, "which interest shall be paid annually or the policy be forfeited;" the note stating that it is given for part of the premium, and is to remain a lien upon the policy until it becomes due by limitation or by the death of the assured, when the note is to be deducted from the policy. Now, whether there is or is not some repugnancy in these various and different clauses and stipulations above referred to, is a question which we shall not stop to consider. It is sufficient to say that when they are all construed together as parts of the same transaction, as they obviously must be to ascertain the real meaning of the contract, we find no difficulty in affirming the judgment.

The scheme or plan of the policy, so far as ascertainable, is plainly opposed to an entire forfeiture on default to pay any premium falling due. For the company expressly agrees that if default shall be made in the payment of any premium, it will pay as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default. That this is a correct interpretation of the policy when the entire annual premium is paid in cash, is not seriously controverted. The question then is, What result follows when, as in this case, only a part of the annual premium is paid in cash, and a loan note given for the residue? The counsel for the company contend that then, by the terms of the policy, a failure to pay the interest on the notes on the date of the annual maturity of the premium, or within three months thereafter, works an entire forfeiture. And they rely in support of this position upon the doctrine of those cases which hold that the obligation of the company ceases upon failure to make payments as specified in the pol-

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

icy. The principal of these decisions is quite familiar, but the facts of this case render it inapplicable. In the first place, it will be seen that by the third condition above quoted, it is provided that if the premiums, or *the interest upon any note given for premiums*, shall not be paid on or before the days mentioned for the payment thereof, then the company is exonerated from the payment of the whole sum assured, and is only liable for such part thereof as is expressly stipulated. If there is any conflict or repugnancy between this condition and the prior clause, that in order to secure such proportion of the policy all premium notes must be taken up or the interest thereon be paid annually in cash on the date of the annual maturity of the premium, or within three months thereafter, the condition upon obvious principles should prevail. Forfeitures are only enforced when it appears that this is the plain intent and meaning of the contract; and the rule applies, that the words of an instrument shall be taken most strongly against the party employing them. But this is not all. The policy makes provision for the distribution of the surplus when earned. At the third annual renewal, the dividend of the first year was due, "*and on note policies will be applied, first, to pay the unpaid interest on loan notes, and then, to the notes themselves.*" Here is a clear and unqualified stipulation on the part of the company that the dividends should be appropriated on a note policy, first, to the unpaid interest on the loan notes, and then to the discharge of the principal of the notes themselves. And it was the manifest duty of the company to so apply the dividend due the insured March 29th, 1874, and prevent a forfeiture, if, indeed, by the terms of the policy, a forfeiture would result from a failure to pay the interest then due on the outstanding loan notes. Under these circumstances, it would be most unjust and inequitable to allow the company to prevail in its defense that the policy, as to the three-tenths of the original sum, became forfeited for nonpayment of interest. The premium notes outstanding are

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

made a lien upon the policy, and of course are to be deducted from the amount of the recovery. It will be seen that this is the provision made for their payment after the proper application of the dividends. For the insured in no event is bound to pay the principal of these notes; for the stipulation in reference to them is, that they "are to be paid only by dividends, or by deduction from the policy when it matures."

In answer to this view as to the rights and obligations of the parties, the counsel for the company claimed that the agreement to apply the dividends to the payment of interest on premium notes had no reference to a partially lapsed policy, but was obviously restricted to full policies. We see no warrant whatever for thus restricting the meaning of the clause. The language used is clear, unqualified and sufficiently comprehensive to include all note policies; and there is nothing in the context which to our minds evinces an intention to exclude policies partially lapsed. Nor is this construction of the clause inconsistent with or repugnant to any other provision relating to the same subject, which controls it. A still further objection is urged to the construction indicated, which is, that the contract requires the interest on outstanding notes to be paid in *cash*; and it is said that the uniform practice of the company has been to insist upon such payment in case of lapsed policies, the dividends being always applied to the discharge of the principal of the notes. Dividends due the insured are cash; and if the practice of the company has been to refuse to apply them in payment of interest on policies like this, it has simply violated its agreement. The money was in the possession of the company, and no excuse is given for its failure to make the appropriation. It is said that to entitle the insured to the dividend of \$51.15, there must have been a policy in force when it became due; or in other words, that the insured must have been a policy holder. There is no occasion to controvert the correctness of this position. For if in any event default in the payment of the in-

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

terest on the outstanding notes would work a forfeiture of the policy, in the most favorable view for the company, the forfeiture would not be incurred until after the expiration of three months from the 29th of March, 1874. So that, in whatever aspect the case is considered, we see no valid ground for holding that all the rights of the insured under the policy had ceased and determined on account of default in the payment of the interest on the outstanding notes. Whether a different result would have followed had there not been a dividend due the insured sufficient to meet the amount of interest, is not a question before us. The case of the *St. Louis Mutual Life Ins. Co. v. Grigsby*, 10 Bush, 310, holds that even under such circumstances there will be no forfeiture of the policy; but it is not necessary to go to this extent in the case before us. The Kentucky case is criticised and disapproved in a recent decision made by the supreme court of Missouri in the case of *Russum v. St. Louis Mutual Life Ins. Co.* (unreported). The counsel for the defendant favored us with a copy of the opinion of the court in the latter case, as published in the St. Louis Republican, February 16, 1876. The court of Missouri think that the decision in the *Grigsby case* virtually makes a stipulation in respect to the payment of interest on the outstanding notes, which the parties to the contract declared to be of vital importance, of no significance whatever. Whether this criticism upon the decision in the *Grigsby case* is well founded, is a point we shall not consider. It is quite sufficient for our purpose to say that the court of Missouri clearly recognizes the principle which we have applied to the case at bar, and would doubtless have enforced it in the *Russum case*, had the facts of that case rendered it applicable. On the 2d of December, 1870, the time for making the third annual payment, the insured made default. A dividend was declared on the policy for that year, of \$129.89. In 1871, no dividend was earned; and in July, 1872, the insured died. The court says: "When, on the 2d of Decem-

Hull, Adm'r, vs. The Northwestern Mutual Life Insurance Company.

ber, 1870, he failed to pay the interest on his note for \$580.11, then maturing, there was to his credit in the hands of the company, \$129.89. This sum the company was bound to apply first in such manner as to save the forfeiture; that is, to the payment in advance of the interest on this note. The balance was applicable to the reduction of the principal of the note. This left more than \$480 of the principal of the note unpaid. When, on the 2d of December, 1871, he failed to pay in advance the interest on this unpaid note, he incurred the forfeiture provided in the policy." It is very evident from this extract, as well as from the reasoning in the opinion, that if a dividend had been earned for the year 1871, sufficient to discharge the interest on the outstanding note, the policy would have been held good as to two-tenths of the original sum insured. For then, in that case as in this, there would have been no ground whatever for holding that the insured had failed in the performance of the contract on his part, and that the company was thereby released from all obligations under it. The money would have been in the possession of the company to pay the interest when due; for the dividends earned belonged to the insured. There is also a recent case in Iowa (*Ohde, Adm'r, etc., v. The Northwestern Mutual Life Ins. Co.*, 2 Central Law Journal, No. 36), which, so far as it has a bearing on the questions discussed above, supports our views. But, in affirming this judgment, it is not necessary to come in conflict in any way with the doctrine of the cases which hold that where the parties have agreed that upon failure to pay any note or obligation given for a premium the policy shall become void, there a default works a forfeiture. Here there was no default, it being the duty of the company to apply the dividends earned, first to pay the interest on the notes, and then to the discharge of the principal. This is the clear, distinct contract of the parties.

By the Court.—The judgment of the circuit court is affirmed.

Seehawer vs. The City of Milwaukee.

SEEHAWER VS. THE CITY OF MILWAUKEE.

CHANGE OF VENUE *for prejudice of judge. When applicant's affidavit upon belief, conclusive, and when not so.*

1. Although the statute (R. S., ch. 123, sec. 8) gives a party to an action the right to a change of the place of trial on the ground that the judge is prejudiced, and not because such party *believes* or *fears* that he is so, yet when the application is made to the judge whose prejudice is alleged, although alleged only upon belief, the place of trial must be changed, the statute making the averment in such case conclusive proof.
2. Under sec. 5, ch. 362 of 1860 (as reenacted by sec. 1, ch. 280 of 1873), in an action commenced in the circuit court for Milwaukee county, if either party entitles himself to a change of the place of trial for any of the reasons mentioned in said statute, the action must be sent to the county court of the same county, "unless it shall appear" that one of the same objections exists to trying such action before the judge of the county court. *Held*, that the affidavit of the party to the prejudice of the county judge is *not conclusive* in such a case, but the averment is traversable and subject to be adjudicated by the circuit court.
3. No argument adverse to the foregoing conclusion can be drawn from ch. 95, R. S. of 1849; that statute having been repealed by sec 1, ch. 191, R. S. of 1858, although preserved in the appendix to that revision.

APPEAL from the Circuit Court for *Milwaukee* County.

The plaintiff, having taken an appeal to the circuit court from an assessment and award of damages and benefits made by the board of public works of the defendant city on account of some proposed public improvement, moved that court for a change of the place of trial to some other county. The ground of the motion, stated in the affidavit of the plaintiff upon which it was founded, is, that the plaintiff verily believes that the judge of the court in which the action was pending is prejudiced in favor of the city, "and that on account of such prejudice, deponent *fears* and *believes* that he will not receive a fair trial in said action in said circuit court." The affidavit also contains an averment, in the same language, of the prejudice of the judge of the Milwaukee county court. On

Seehawer vs. The City of Milwaukee.

the hearing of the motion, an affidavit was read in opposition thereto, tending to show that the judge of the county court was not prejudiced in favor of the city, and that the fears of the plaintiff in that behalf were groundless.*

The circuit court made an order changing the place of trial to the county court of Milwaukee county. The plaintiff appealed from that portion of the order which directed the cause to be sent to the Milwaukee county court.

F. W. Cotzhausen, for appellant, argued that although the law of 1860 did not, in express terms, prescribe the manner in which the prejudice of the county judge should be made to appear, it was reasonable to suppose that the legislature intended the objection to the county court should be interposed at the same time, and be made to appear in the same manner, as the objection to a trial in the circuit court, and that ch. 101, Laws of 1862, was simply declarative of this intent; that the determination of the question of prejudice in the county judge,

*The affidavit here referred to is that of Emil Wallber, Esq., which states that he is, and for two years last past has been, city attorney of the *City of Milwaukee*; that the Hon. John E. Mann was appointed county judge of the county of Milwaukee in the early part of the year 1874; that since that time but one suit has been tried before said Judge MANN in which said city of Milwaukee was a party or interested, that being the suit of *Margaretha Bludeau* against said city to recover damages for injuries sustained by falling from the approach to a bridge into the river while said bridge was open; that said action was tried before the said county judge and a jury in June, 1875; that during said trial the affiant, who appeared for said city, moved for a nonsuit, which motion was denied by the court, and that afterwards the jury returned a verdict in favor of the plaintiff, and against said city; that "said county judge certainly did not show upon the trial of said action any prejudice in favor of said city;" that the affiant does not believe that said judge was or is so prejudiced in favor of said city; that in the case of *Charles H. Warner* against the *City of Milwaukee et al.*, pending in said county court, a demurrer interposed by said city to the complaint was overruled by said county judge on the day of the date of said affidavit; and that the affiant avers and verily believes that the plaintiff in this action is not acquainted with Judge MANN, and that he made the affidavit upon which a change of venue is sought to be obtained, at the request of his attorneys.

Seehawer vs. The City of Milwaukee.

involved the exercise of a judicial function, the decision of a question of fact in the progress of the cause, by a judge shown upon the record to be prejudiced; and that for such a purpose he had no longer any jurisdiction. 15 Wis., 92, and cases there cited.

Emil Wallber, for respondent :

The right of removal is given by the statute, and cannot be broader or other than as therein prescribed. *Heath v. Mathiew*, 19 Wis., 114. The language of the statute admits of the exercise of a discretion so far as the judicial determination of the existence of any objection to the county court is concerned; and in the absence of other proof than the allegations of the applicant upon belief, the court would have been justified in refusing to send the case out of the county. *Frank v. Avery*, 21 Wis., 166. Not only does the statute authorize the exercise of such a discretion, but the same reason does not apply which refuses it to a judge to whom his own prejudice is alleged. The court exercised a sound discretion in this case. *Frank v. Avery, supra*; *Couillard v. Johnson*, 24 Wis., 533; *Rowan v. State*, 30 id., 134. The fact that the legislature reenacted the law of 1860 without reviving that of 1862, evinces an intention to require some other proof of the prejudice of the county judge than the affidavit of the party.

LYON, J. The law does not give a party to an action the right to have the place of trial changed "on account of the prejudice of the judge" (R. S., ch. 123, sec. 8), merely because the party *fears* or *believes* that the judge is prejudiced; but because he *is* prejudiced; and the fact that such prejudice exists must be made to appear, before the place of trial can lawfully be changed for that reason.

Yet, doubtless, it is sufficient, *prima facie*, to allege the prejudice on belief; because prejudice is a mental condition, and the party asserting it cannot, in the very nature of things, swear positively to its existence in the mind of the judge.

Seehawer vs. The City of Milwaukee.

Should such prejudice be averred positively, in form, it would amount to nothing more than an averment thereof on belief. *Tainter v. Lucas*, 29 Wis., 375. Hence, when the application is made to the judge whose prejudice is alleged, although alleged upon belief, the place of trial must be changed, pursuant to sec. 8, *supra*, not merely because the party fears or believes that the judge is prejudiced, but because in such case the statute makes the averment conclusive proof that he is prejudiced.

It is clear, therefore, that the affidavit upon which the motion to change the place of trial was founded in the present case, was, for the purpose of the motion, conclusive of the prejudice of the circuit judge, although the averment of such prejudice is made on belief. The question to be determined is, whether it is also conclusive of the prejudice of the county judge. The answer to this question depends upon the construction of the following statutes relating to changing the place of trial of actions pending in the circuit and county courts of Milwaukee county: Laws of 1860, ch. 362, sec. 5; Laws of 1862, ch. 101, sec. 1; Laws of 1868, ch. 37, secs. 2 and 3; Laws of 1873, ch. 280, sec. 1. The first of these acts is now in force; and it required the circuit court to send this cause to the county court, unless it was made to appear, not merely that the plaintiff feared or believed that the county judge was prejudiced, but that he was prejudiced in fact. If the legislature intended that the averment thereof on belief should be conclusive evidence of the prejudice, nothing was easier than to say so in plain and unmistakable language. It is fair to presume that, had the legislature so intended, sec. 5 of the act, of 1860 would have been framed like sec. 8, ch. 123, R. S. That is to say, in such case it would have been expressly provided in the act, that if the applicant made affidavit to the prejudice of the county judge as well as to that of the circuit judge, the cause should be sent to another circuit. But no such language is employed. On the contrary,

language is employed which shows a manifest intention by the legislature that the averment of the prejudice of the county judge shall be adjudicated and determined by the circuit court, like any other traversable averment of fact.

This view is strengthened by the amendatory act of 1862, *supra*, which provided that the prejudice of the county judge, because of which the circuit court was required to send the cause to another circuit, instead of sending it to the county court, should be "made to appear *by the affidavit of a party to the action* at the time of the application for such change of the place of trial." Had the act of 1862 remained in force, the circuit court should have sent the case to another circuit; for it is clear that under such act, the affidavit would, for the purposes of the motion, have been conclusive of the existence of the alleged prejudice. But that act was expressly repealed by the law of 1868, *supra*, and the original sec. 5 of the law of 1860 reenacted by ch. 280, Laws of 1873. It is manifest that the legislature believed that the act of 1860 prescribes a different rule on this subject than was prescribed by the act of 1862. Had it desired that the affidavit of the prejudice of the county judge should continue to be conclusive of the fact, the legislature would, doubtless, have retained or restored the act of 1862.

An argument on behalf of the appellant, adverse to some of the views above expressed, was drawn from the phraseology of ch. 95, R. S. of 1849. That chapter was repealed by sec. 1, ch. 191, R. S. of 1858, and although it is preserved in the appendix to that revision (p. 1055), and appears in Judge Taylor's compilation (p. 1425, §§ 14-16), we are not advised that it has been reenacted.

We conclude that, although the affidavit of the prejudice of the circuit judge deprived the circuit court of jurisdiction to try and determine the action, it did not deprive that court of jurisdiction to hear evidence and determine whether the county judge was also prejudiced. The circuit court exercised

Smith and another, Executors, vs. Peckham, Executrix.

such last mentioned jurisdiction, and, on the evidence before it, we think decided the question correctly.

By the Court. — Order affirmed.

SMITH and another, Ex'rs, vs. PECKHAM, Executrix.

ACTION BY FOREIGN EXECUTOR: PLEADING: PROBATE COURT. (1)

When foreign executor may sue here. (2) How plaintiff's mere disability must be pleaded. (3) Query as to reversal of judgment for plaintiff's disability. (4) How question of disability of claimant in probate court must be raised. (5) When foreign executor may maintain appeal from probate court, his prior disability being removed after the appeal. (6) What probate court has jurisdiction of will. One suing as executor must allege testator's residence at death.

1. Under the statute authorizing a foreign executor or administrator of the estate of a person not a resident of this state at the time of his death, to prosecute actions here in behalf of such estate, "upon filing an authenticated copy of his appointment in the probate court of any county of this state" (Tay. Stats., 1720, § 25), the disability of such executor, etc., to sue before such filing is *mere disability*, and not want of title.
2. Before the letters testamentary, etc., are filed here, such disability can be taken advantage of, by answer, only by way of *abatement*.
3. A mere disability to sue, not going to the right of action, may be cured *pendente lite*; and *quære* whether (under R. S., ch. 125, sec. 40) a judgment on the merits would be reversible for such disability, even where the objection had been seasonably taken, and overruled.
4. An objection in probate court to a claim against an estate on the ground that it was "outlawed and illegal and void for usury," *held*, not to raise the question of the disability of the claimants.
5. On appeal from an order allowing such claim, it appeared from the formal complaint of the claimants in the circuit court, that their foreign letters testamentary of the estate in whose behalf the claim was made, were first filed *after* the appeal. *Held*, on demurrer, that the complaint was not bad for that reason.
6. The proper jurisdiction for the probate of a will is that of the testator's domicile at death; and the complaint herein not showing the residence of plaintiff's testatrix at her death, an order overruling a demurrer thereto is reversed with directions to allow an amendment of the complaint.

Smith and another, Executors, vs. Peckham, Executrix.

APPEAL from the Circuit Court for *Milwaukee* County.

On March 30, 1874, a claim was filed in the probate court for Milwaukee county, against the estate of G. W. Peckham, deceased, by the plaintiffs as executors of the estate of Eliza Griggs, deceased, of Albany county, New York. On April 20, 1874, objection to the allowance of the claim was made in writing, on the grounds that it was outlawed, and was void for usury. On October 23, 1874, the claim was allowed by the county judge. On appeal, the circuit court made an order, May 3, 1875, that an issue be made up; and accordingly the complaint was filed on the 4th of May, and on May 27 an amended complaint was filed. The latter alleged, in substance, that on April 9, 1863, George W. Peckham made and delivered to Eliza Griggs a promissory note (describing it), on which divers payments were made between April 9, 1864, and April 9, 1869; that afterwards Eliza Griggs died, leaving a will, "which was duly proved and admitted to probate in the office of the surrogate of the county of Albany, in the state of New York, and letters testamentary were thereupon duly issued" to the plaintiffs, who had qualified and entered upon their duties as such executors, which office they still held; that on May 21, 1875, they had caused to be filed in the probate office of the county court of Milwaukee county, an authenticated copy of such appointment; and that no executor or administrator of such estate had been appointed in this state. There were further averments of the representative character of the defendant, and that the note in suit was unpaid, etc.

The defendant demurred to the complaint on the grounds, 1. That the plaintiffs had no legal capacity to sue, because it appeared from the complaint that they brought the suit as foreign executors, and it was not alleged that, before the commencement of the suit, they had filed a copy of their appointment, etc. 2. That the complaint did not state a cause of action, because it did not allege that any proceedings had been taken in any court to cause the assets of said Eliza Griggs

Smith and another, Executors, vs. Peckham, Executrix.

to be recovered or administered according to the laws of this state, or by which the plaintiffs had acquired any title to the alleged demand as the representatives of the said Eliza Griggs. From an order overruling the demurrer, the defendant appealed.

J. P. C. Cottrill, for appellants:

The demurrer should have been sustained. 1. In this country, formerly, the power of granting letters testamentary and of administration was vested in the ecclesiastical courts. Dayton on Sur., 1 and 2; 2 Black. Com., 494; Williams on Ex'rs, 261. Although the character of the tribunals by which this power is exercised in the different states may differ in some particulars, the source of authority is the same, viz., the sovereignty of the state within which it is exercised. It is universally held that the executor or administrator appointed in one state cannot prosecute a suit in the courts of another state, or obtain title to the assets of his decedent therein, unless invested with such authority and title by the laws of that state. Story's Confl. of Laws, 412, 513, 514; *Noonan v. Bradley*, 9 Wall., 394; *Thompson v. Wilson*, 2 N. H., 292; *Langdon v. Porter*, 11 Mass., 313; *Goodwin v. Jones*, 3 id., 512; *Chapman v. Fisk*, 6 Hill, 554. 2. The demurrer was not too late, the objection being not only to the disability of the plaintiffs, but to the jurisdiction of the court, and that the complaint does not state facts sufficient to constitute a cause of action. The objection filed to the claim merely admitted that *Smith* was a foreign executor. R. S., ch. 75, secs. 7 and 9; *Noonan v. Bradley*, 9 Wall., 394. There were no pleadings in the matter from which the appeal was taken. R. S., ch. 101, secs. 1, 25. The proceedings before the commissioner were equivalent to the service of a summons in an action, and no more. *Fenner v. Manchester*, 6 R. I., 142. 3. The plea *ne unques administrator* is a plea in bar as well as in abatement. *Noonan v. Bradley*, *supra*; *Langdon v. Potter*, 11 Mass., 313; 1 Chitty's Pl., 435. 4. The filing after suit

Smith and another, Executors, vs. Peckham, Executrix.

brought of the "authenticated copy," etc., required by the statute (R. S., ch. 14, sec. 25) cannot help the plaintiff. There must be a strict compliance with the statute. *Mansfield v. Turpin*, 32 Ga., 260.

F. W. Cotzhausen, for respondent:

1. The appellant, by objecting to the allowance of the claim on specific grounds, and by answering on the merits, waived all objections to the legal capacity of the plaintiffs to sue. The appearance and objection to the petition in probate was tantamount to an answer. *Brook v. Chappell*, 34 Wis., 405; *Moir v. Dodson*, 14 id., 279; *Johnson v. Wilson*, 1 Pin., 65; *Sanford v. McCreedy*, 28 Wis., 103. 2. The disability of plaintiffs was removed by filing the authenticated copy on May 21, 1875. The defect, if any, is of a technical nature, and should be disregarded. *Sabine v. Fisher*, 37 Wis., 376. The court had the power to allow letters testamentary to be filed at any stage of the suit, *nunc pro tunc*.

RYAN, C. J. Whatever difficulty there may be in the question elsewhere (Story's Confl., §§ 507-529), there appears to be no doubt here that the disability of a foreign executor or administrator to sue in the courts of this state, is mere disability and not want of title.

Under our statute (Tay. Stats., ch. 147, § 25), a foreign executor or administrator takes here no new letters, authority or title, but is required only to record the letters, authority and title from the foreign court. Like the record of a conveyance, this is matter of evidence of title, not of title; the title still resting on the grant of the foreign court, though it can be asserted in our courts only upon the record of it. The filing of the foreign letters here is purely ministerial, requiring no action of the court here and giving it no jurisdiction. Before the record, the general disability of a foreign executor or administrator to sue outside of the state granting his letters

Smith and another, Executors, vs. Peckham, Executrix.

continues here; with the record, the disability ceases upon that proof of title under the foreign jurisdiction.

Even before the record, the disability can be taken advantage of only by way of abatement. So far as the case can bear any relation to the law of this state, there is no doubt, on principle or authority, that the dissenting opinion in *Noonan v. Bradley*, 9 Wall., 394, states the correct rule of pleading. And being waived as matter of abatement, it cannot be raised by way of bar. *Moir v. Dodson*, 14 Wis., 279; *Johnson v. Wilson*, 1 Pin., 65. See Story's Conf., § 465.

And a mere disability to sue, not going to the right of action, may be cured here *pendente lite*. *Sabine v. Fisher*, 37 Wis., 376. Indeed, if the disability had not been removed in this case, and it had gone to judgment on the merits for the respondents, it would be a question whether, under sec. 40, ch. 125, R. S., we should be at liberty to reverse the judgment for an erroneous ruling of this point by the court below against the appellant on the demurrer. *Hafern v. Davis*, 10 Wis., 501; *Wheeler v. Smith*, 18 id., 651; *Bonnell v. Gray*, 36 id., 574.

The proceeding in the probate court was very informal, and the paper filed by the appellant by way of plea does not raise the question of the respondent's disability. The question was first raised by the demurrer to the formal complaint filed under the order of the circuit court. We are inclined to think that it was then in time (*Tarbox v. Supervisors*, 34 Wis., 558), if well taken; but the difficulty was removed by the intermediate filing of the letters testamentary of the respondents.

So far we have assumed that the respondents' letters issued from the proper court having jurisdiction at the domicile of their testatrix. But the residence of the testatrix at the time of her death is not averred in the complaint. This is obviously a formal, but appears to us to be a fatal, objection to the complaint. *Non constat* that the testatrix was not domi-

Meyer and another vs. Hanchett.

ciled in this state when she died, and that the probate jurisdiction of her estate was not here. Of course the proper jurisdiction for the probate of her will, in chief, was that of her domicile at death. Probate of her will elsewhere would be ancillary. The statute is probably intended to relate only to letters testamentary and letters of administration issued in the jurisdiction of the domicile at death. It obviously has no application to cases where the decedent was domiciled here at the time of death, and jurisdiction to administer the estate was in one of our own courts.

On that ground only we sustain the demurrer. But the court below should allow the respondents to amend their complaint in this particular.

By the Court. — The order of the court below is reversed, and the cause remanded for further proceedings in accordance with this opinion.

MEYER and another vs. HANCHETT.

AGENCY: FRAUD. (1, 3) *When one acting as vendor's agent precluded from claiming for services as agent of vendee.*

PRACTICE. (2) *Error in rejecting material evidence not cured by a correct statement of the law in the charge.*

1. One who acts as the vendor's agent in the sale of property, without the knowledge of the vendee, cannot recover from the vendee for services in effecting such sale as his agent; his concealment of the fact that he was agent for the vendor being a fraud in the law.
2. Although the law as above stated was correctly given to the jury in this case, the judgment must be reversed for the rejection of material evidence bearing on the question of fact.
3. Whether one who acts as middleman in effecting an exchange of real property, with full knowledge of both parties, can recover from both for his services, is not here decided.

APPEAL from the County Court of *Milwaukee* County.

Action to recover a commission upon a sale of real estate, claimed by plaintiffs to have been effected by them as brokers under employment for the defendant.

The answer denied the employment, and alleged that if the court should hold that the correspondence of the parties did constitute a contract, then plaintiffs' services were of no value to defendant; that they made false and fraudulent representations as to the value of certain property taken by him in exchange for his own property, upon which representations he relied in making such exchange; and that the person with whom the exchange was made was the plaintiffs' own client, and paid them for effecting the trade.

The evidence disclosed the following facts: Plaintiffs were real estate brokers, whose business it was to procure customers for property placed in their hands for sale, the sale itself being usually negotiated by the parties themselves. Being requested by the defendant to secure him a loan upon or a sale of his property, for which, if accomplished, he expressed a willingness to pay liberally, they offered him in exchange a store and stock of goods at Oak Creek, representing it to be of a certain value, greater than its real value, and also representing that the owner, Mr. Hobart, whom in their correspondence they styled their "customer," was thoroughly reliable, and that whatever he said might be depended upon. Defendant sent out an agent, who looked at Hobart's property, and with whom Hobart returned to view defendant's farm; and after the examination, the parties effected a trade between themselves.

Plaintiffs admitted, for the purposes of the case, that prior to and at the time of the exchange, they had a contract with Hobart, by which they were to assist him in selling his property at Oak Creek for a compensation.

The court rejected defendant's offers to show, in substance, that he had no notice from plaintiffs, and no knowledge, that in negotiating the exchange of property between himself and

Meyer and another vs. Hanchett.

Hobart, they expected to receive compensation from both himself and Hobart, or had any understanding with the latter that he should compensate them. The evidence so rejected is more fully stated in the opinion; as also certain instructions given to the jury upon the same subject.

The plaintiffs had a verdict and judgment for \$857.22; and defendant appealed from the judgment.

Geo. H. Noyes, for appellant:

1. It is well settled that to entitle a real estate agent to recover compensation from both vendor and vendee, the contract with the vendor must be a specific one, to do some particular act, as merely to find a party ready and willing to purchase at a price fixed by the vendor, or to procure an interview with a certain person; and the contract must be such as to clearly show that the hiring was for this particular act, and not a general employment for the purposes of a sale or exchange. *Herman v. Martineau*, 1 Wis., 155; *Mullen v. Keetzel*, 7 Bush, 253; *Rupp v. Sampson*, 16 Gray, 398; *Stewart v. Mather*, 32 Wis., 355. The hiring in this case was a general one, and plaintiffs could not perform their duty to the defendant and at the same time serve Hobart for compensation. 2. The only theory on which a recovery could be had was, that the relations of the plaintiffs to both parties was made known to the defendant, and that he had consented to their so acting. There was no evidence whatever of such knowledge or consent, and a nonsuit should have been granted. *Farnsworth v. Hemmer*, 1 Allen, 494; *Walker v. Osgood*, 98 Mass., 348; *Everhart v. Searle*, 71 Pa. St., 256; *Lloyd v. Colston*, 5 Bush, 590. The *onus* rested upon the plaintiffs; but defendant should have been permitted to show what the fact was, and the instructions given by the court were based upon the theory that the testimony offered was or should have been admitted. 3. A broker employed to sell a farm or dispose of it by way of exchange for other real estate, cannot charge the owner of the latter a commission for effecting the

Meyer and another vs. Hanchett.

exchange, nor could he collect such commission even under an agreement therefor, or by proof of a custom among brokers authorizing it. *Raisin v. Clark*, 41 Md., 158; Am. Law Reg., Jan., 1876, p. 61.

F. W. Cotzhausen, contra, contended that the plaintiffs were middlemen merely, and not agents of the defendant for the sale or exchange of his farm, standing to him in a fiduciary relation and having some discretion and control over the conditions of sale; that their business was simply to find purchasers or opportunities for sale, leaving the parties to negotiate and deal with each other at pleasure; that the law leans to that construction of the contract which will secure to the broker his commission (*Stewart v. Mather*, 32 Wis., 344); and that the defendant's knowledge of the relations of the plaintiffs to Hobart was shown in the correspondence of the parties, and would be presumed from his knowledge of the general character of plaintiffs' business.

COLE, J. The counsel for the plaintiffs admitted on the trial that, prior to and at the time of the exchange of the defendant's farm for the Oak Creek property, the plaintiffs had a contract with Hobart, by which they were to assist him in selling his property at Oak Creek for a compensation. Thereupon the defendant offered to prove by *Meyer*, one of the plaintiffs, that the plaintiffs did not notify the defendant that, in negotiating or assisting in negotiating this exchange, they were to ask for or strive to recover compensation from both him and Hobart, and that in pursuance of the agreement with Hobart they had received compensation from him for their services. This testimony was excluded by the court. In the same connection the defendant proposed to prove by his own testimony, that no notice was given to him by the plaintiffs, and that he did not know, that they intended to charge, or had charged, and would endeavor to recover, compensation from both him and Hobart, and that they did not

Meyer and another vs. Hanchett.

notify him, and he did not know, that they had any understanding with Hobart for compensation; which testimony was also excluded by the court. It seems to us very plain that the court erred in excluding the evidence offered, especially in view of the admission that prior to and at the time the exchange or trade of the different properties was effected, the plaintiffs had a contract with Hobart by which they were to assist him in selling his Oak Creek property for a compensation. The object of the testimony was to prove the precise relations which the plaintiffs occupied both in respect to Hobart and the defendant, and to establish the fact that they were acting as agents for both parties in the transaction, while concealing that fact from the defendant. It is well settled that the plaintiffs could not recover for services rendered while holding such entirely incompatible relations. It would be a fraud for the plaintiffs to conceal from the defendant the fact that they were employed to aid Hobart in the disposition of his property, while acting as his agent. Upon this point the law is so clearly stated by BIGELOW, C. J., in *Farnsworth v. Hemmer*, 1 Allen, 494-5, that we cannot do better than quote his language. "The principle," says the learned chief justice, "on which rests the well settled doctrine, that a man cannot become the purchaser of property for his own use and benefit, which is intrusted to him to sell, is equally applicable where the same person, without the authority or consent of the parties interested, undertakes to act as the agent of both vendor and purchaser. The law does not allow a man to assume relations so essentially inconsistent and repugnant to each other. The duty of an agent for a vendor is to sell the property at the highest price; of the agent of the purchaser, to buy it for the lowest. These duties are so utterly irreconcilable and conflicting that they cannot be performed by the same person without great danger that the rights of one principal will be sacrificed to promote the interests of the other, or that neither of them will enjoy the benefit of a dis-

Meyer and another vs. Hanchett.

creet and faithful exercise of the trust reposed in the agent. As it cannot be supposed that the vendor and purchaser would employ the same person to act as their agent to buy and sell the same property, it is clear that it operates as a surprise on both parties, and is a breach of the trust and confidence intended to be reposed in the agent by them respectively, if his intent to act as agent of both in the same transaction is concealed from them." Equally distinct and emphatic is the language of the courts upon precisely the same question, or kindred ones, in *Rupp v. Sampson*, 16 Gray, 398; *Walker v. Osgood*, 98 Mass., 348; *Bollman v. Loomis*, 41 Conn., 581; *Everhart v. Searle*, 71 Pa. St., 256; *Raisin v. Clark*, 41 Md., 158; *Morrison v. Thompson*, Law Reports, 9 Q. B., 480; *Lloyd v. Colston*, 5 Bush, 587; *Stewart v. Mather*, 32 Wis., 344; *Grant v. Hardy*, 33 id., 668; *In re the Taylor Orphan Asylum*, 36 id., 534. See also Story on Agency, §§ 31 and 211 and cases in notes.

In this case the court below instructed, at the request of the defendant, that if the jury found from the testimony that the plaintiffs were employed by the defendant to assist in negotiating the sale or exchange of his farm, and at the same time were employed by Hobart to negotiate or assist in negotiating the sale or exchange of his Oak Creek property for a compensation, and concealed the fact of their agency for Hobart, and the defendant did not know of it, and had no knowledge that the plaintiffs intended to charge both him and Hobart commissions, then there could be no recovery; though the evidence was excluded to which this proposition of law was applicable. It is unnecessary to remark that if the proposition of law is correct—as it doubtless is,—the proposed evidence should have been admitted. Nor do we deem it any sufficient answer to say that the evidence excluded could not have aided the defendant, because the inference was plain from the letters of the plaintiffs written to him during the negotiations, that their precise relations to Hobart were

Meyer and another vs. Hanchett.

known to him. As a matter of construction or inference, it is impossible to say that the letters disclosed the true relations between the plaintiffs and Hobart, and showed that they were acting for him in effecting the trade or exchange of the different properties for a compensation; and the defendant offered to prove by his own testimony that the plaintiffs did not notify him of that fact, and that he did not know that they had any understanding with Hobart for compensation. It would be improper for us at this time to express any opinion on the question discussed, whether the employment of the plaintiffs by both Hobart and defendant did or did not involve something more than the duty of a "middleman." Nor, as the case now stands, can we consider the further question whether the plaintiffs could recover their fees from the defendant providing their actual relations to both parties had been fully known to him, and he had thereafter consented to their so acting. To this extent the cases are in accord, that the agent of one person cannot, without his knowledge and consent, act for the other party in the same transaction, where the interests of the opposite parties are adverse. "Even custom or usage will not be allowed to extend the right to act for and receive compensation from both parties, to matters in which the interests of the parties are or may be diverse." *Walker v. Osgood*; *Farnsworth v. Hemmer*; *Raisin v. Clark*. But as there must be a new trial on account of the improper rejection of evidence, any further discussion of the questions involved would be inappropriate.

By the Court.—The judgment of the county court is reversed, and a new trial ordered.

Redmond vs. The Galena & Southern Wisconsin Railway Company.

REDMOND VS. THE GALENA & SOUTHERN WISCONSIN RAILWAY
COMPANY.

JUSTICE'S COURT. (1) *Jurisdiction of statutory action against railroad company, for work in building road.*

RAILROAD COMPANY. (2) *Liable in statutory action to employees of subcontractor in the second degree; (3) although nothing then due such contractor.*

1. Under sec. 10, ch. 119 of 1872, as amended by sec. 1, ch. 246 of 1873, the relation of a railroad company to a person employed by its contractor to perform work in the construction of its road, is that of a guarantor (upon certain conditions specified in the statute) of payment for such work by such contractor (*Streubel v. Railway Co.*, 12 Wis., 67); and the employee's action against the company, as one "growing out of contract," may be brought in *justice's court*, for an amount not exceeding the justice's jurisdiction. R. S., ch. 120, sec. 5, subd. 1.
2. The term "contractor," in said act, includes subcontractors in the *second degree*, as well as those who contract directly with the company.
3. As the statute peremptorily requires the action to be brought within fifty days after the labor is performed, it is immaterial whether at the commencement of the action there is anything yet due from the company to its contractor, or not.

APPEAL from the Circuit Court for *Grant* County.

The action was brought before a justice of the peace, pursuant to sec. 10, ch. 119, Laws of 1872, as amended by sec. 1, ch. 246, Laws of 1873, to recover for work done by the plaintiff in the construction of the defendant's railroad. The plaintiff was employed to perform such work by a subcontractor in the second degree from the defendant company, and not by the person who contracted directly with the company to construct such railroad. Notice was given to the company, and the action was commenced, within the times limited therefor in the above statutes. When the action was commenced, nothing was due from the company to any contractor or subcontractor on account of the plaintiff's work; but the price of

Redmond vs. The Galena & Southern Wisconsin Railway Company.

such work was due the plaintiff from his immediate employer. The cause was duly appealed from the justice, and a trial thereof in the circuit court resulted in a verdict and judgment for the plaintiff for the price of his work. That court denied a motion to dismiss the action, and held that the justice had jurisdiction thereof, and that the plaintiff's employer was a *contractor*, within the meaning of the above statutes. The court also instructed the jury, in substance, that it was immaterial whether, when the action was brought, the money sued for was due from the defendant to the contractor, the only material inquiry being, whether it was due from the latter to the plaintiff.

The defendant appealed from the judgment against it, and assigns for error, 1. The refusal of the circuit court to dismiss the action for want of jurisdiction in the justice; 2. Its refusal to dismiss the action on the ground that the plaintiff's employer was not a *contractor* within the meaning of the above statutes; and 3. The giving of the above instruction.*

* Sec. 10, ch. 119, Laws of 1872, as amended by ch. 246, Laws of 1873, is as follows: "As often as any contractor for the construction of any part of a railroad which is in progress of construction, shall be indebted to any laborer for thirty or any less number of days labor performed in constructing said road, either for manual or team labor or both, including team and driver, such laborer may give notice of such indebtedness to said company in the manner herein provided; and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days labor, and the time when the same was performed, for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer or his attorney, and shall be served on an engineer, agent or superintendent employed by said company, having the charge of the section of road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such agent, engineer or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section, unless the same is commenced within thirty days

Redmond vs. The Galena & Southern Wisconsin Railway Company.

The cause was submitted on briefs.

Wm. E. & Geo. B. Carter, for appellants:

1. The jurisdiction of a justice is limited strictly by statute (*Cox v. Groshong*, 1 Pin., 307; *Jones v. Reed*, 1 Johns. Cas., 20; 1 Caines, 594; *Wells v. Newkirk*, 1 Johns. Ch., 228; *Way v. Carey*, 1 Caines' Cas., 191); and this action, if within a justice's jurisdiction at all, must be so by virtue of subd. 1, sec. 5, ch. 120, R. S., as an action arising out of contract. A contract imports an agreement, either express or implied, between the parties to it. 1 Parsons on Con., 6; 1 Burr. Law Dic., "Contract" and "Agreement;" 2 Steph. Com., 108-110; 2 Black. Com., 442-3; 3 id., 158; 2 Kent's Com., 449; 4 Wheat., 122, 197; 6 Cranch, 87, 136; 11 Peters, 420, 572; Story on Con., § 1; Ency. Am.; Webster; Chitty on Con., 1, 16; *Hodson v. Carter*, 3 Chand., 234. Its essence is mutuality. It must be voluntary. 3 Burr., 1545; 1 Cow., 316; 1 Mason, 288; 1 Parsons on Con., 6; *Pelham v. The State*, 30 Tex., 422. This case is analogous to those of judgments, taxation and other obligations or liabilities imposed or created by law, or otherwise than by the voluntary acts of the parties themselves. But even if a contract in any sense, it is not such within the ordinary meaning of that word, or as intended by the statute in question; and the jurisdiction will not be extended by implication. *Noss v. Cord*, 1 Wis., 389; *Myer v. Gleisner*, 7 id., 55. The language of the court in *Streubel v. M. & M. R. R. Co.*, must be understood as referring to the subject under discussion, viz.: the distinction between that and a penal action, and is not decisive of this case. 2. The word "contractor" should not be extended so as to include a subcontractor. The practical result of such a rule would be to make the railroad company liable to pay the wages of workmen in the rolling mills, and smelting furnaces and mines

after notice is given to the company by said laborer, as above provided: *provided*, that nothing in this act contained shall be construed to extend to or effect in any manner, any actions now pending in this state."

Redmond vs. The Galena & Southern Wisconsin Railway Company.

where the iron is obtained for its track and rolling stock, and of other laborers in the various departments which contribute to those objects. Such a construction should not be allowed, and the case of *Mundt v. S. & F. R. R. Co.*, 31 Wis., 451, should be reconsidered. 3. Is it competent for the legislature to change the contract which may have been entered into between the railroad company and its contractor respecting the time of payment, and authorize suit to be brought by workmen under the contractor, at a time when no payment from the company to the contractor himself has yet matured?

A. W. Bell, for respondent, argued that this was an action arising or growing out of contract. *Streubel v. Railroad Co.*, 12 Wis., 67; *Smith v. City of Appleton*, 19 id., 468; *Mundt v. S. & F. R. R. Co.*, 31 id., 459; *Smith v. Cleveland*, 17 id., 556; *Hasbrouck v. Milwaukee*, 25 id., 135; *Hodson v. Carter*, 3 Pin., 216. To the point that the term "contractor," as employed in the statute, is a generic term, including subcontractors, he cited *Mundt v. S. & F. R. R. Co.*, *supra*; *Kent v. R. R. Co.*, 2 Kern., 628; *Branin v. R. R. Co.*, 31 Vt., 214; *McClusky v. Cromwell*, 1 Kern., 601; *Warner v. Hudson River R. R. Co.*, 5 How., 454; arguing that less regard was to be paid to the letter of the statute than its policy, and that implication might be called in to aid such intent; that the question of the liability of the company to miners and iron puddlers does not arise in this case; that if a construction leads to absurd consequences, or renders the statute a nullity, some exception or qualification will be presumed; and that the statute is a remedial one, and should be liberally construed to advance the remedy and repress the mischief. *Smith on Stats.*, 515, 518, 701, 710; *Potter's Dwaris*, 144, 179, 208, 209, 231, 237; 1 *Barn. & Cress.*, 123; 1 *A. & E.*, 176; 6 *Cranch*, 314, 323; 6 *How. (U. S.)*, 565; 3 id., 565; *Commonwealth v. Kimball*, 24 *Pick.*, 370; 2 *M. & W.*, 471; *Russell v. Wheeler*, *Hemp.*, 3; 15 *Johns.*, 358; 1 *Kent*, 464-5; 43 *Barb.*, 200; *Magdalen Col.*

Redmond vs. The Galena & Southern Wisconsin Railway Company.

lege case, 11 Co., 71 b. Counsel further contended that the plaintiff's right of action was fixed by his own contract, and did not depend upon the time of payment under the contract between the company and its immediate contractor. 32 Wis., 549; 12 id., 67; 31 id., 451.

LYON, J. 1. The learned counsel for the defendant contend that a justice of the peace has no jurisdiction of the action. We agree with counsel that unless the action arises or grows out of contract, express or implied, the position is well taken. R. S., ch. 120, sec. 5. But we are of the opinion that a contract relation exists between the parties in respect to the labor performed by the plaintiff in the construction of the defendant's railroad. The law places the company in the position of surety that the plaintiff's employer will pay him for his work, and renders the company absolutely liable to pay therefor, if certain conditions specified in the statute are complied with. The relation of the company to the plaintiff is the same as though the company had executed a written guaranty, in due form, to the same effect. It was so held in *Streubel v. The M. & M. R'y Co.*, 12 Wis., 67. What was said on this subject in that case is not *obiter dictum*, as counsel seem to think, but relates to and determines the very point upon which the case turned, and is authority upon the question under consideration. We conclude that the first alleged error is not well assigned.

2. The question presented by the second assignment of error is ruled against the defendant in the case of *Mundt v. The Sheboygan & Fond du Lac R. R. Co.*, 31 Wis., 451, where it was held that the act of 1857 (ch. 27) made the railway company liable for the work done for a subcontractor, although the act only specifies claims for labor "against any person being contractor on such railroad *with the railroad company*." Tay. Stats., 1051, § 57. In the law under which this action was brought, and which was enacted several months

Redmond vs. The Galena & Southern Wisconsin Railway Company.

after *Mundt v. The Railway Co.* was decided, the words "with the railroad company" are omitted. This change of phraseology accords with that decision, and leaves little room to doubt (were it doubtful before) that the legislature intended to protect employees of subcontractors, as well as the employees of those who contracted directly with the company. Indeed our observations convince us that, of the two classes of laborers, the employees of subcontractors stand most in need of the protection of the statute.

3. The statute requires that the notice of indebtedness therein mentioned shall be given within twenty days after the labor is performed, and the action commenced within thirty days after such notice has been given. Hence the action must be commenced within fifty days after the work is done. If the laborer cannot maintain an action against the railroad company for his wages until the price of the work becomes due to the contractor under the agreement between the latter and the company, it would be very easy for the company and contractor so to frame their agreement as to deprive the laborer of the security which the legislature evidently intended to give him. Should such agreement give the company ninety days credit after the work is done, for the price of the work, that result would follow. It is manifest that the legislature never intended any such result, and the law ought not to receive a construction which would deprive it of value. We think the jury were correctly instructed.

By the Court. — The judgment of the circuit court is affirmed.

Brown vs. Worden.

BROWN VS. WORDEN.

HUSBAND AND WIFE: PLEADING. *Liability of husband for necessities furnished wife depends on circumstances, which must be stated in complaint.*

1. A husband is not liable for necessities furnished his wife without his consent, except under special circumstances.
2. In an action against the husband, therefore, a complaint which merely alleges that the plaintiff furnished necessities to the wife at her request, and that their value "thereupon became due" from defendant to plaintiff, without stating the special circumstances which made him liable, is insufficient on demurrer *ore tenus* at the trial.
3. If the complaint had averred that the goods were sold or furnished to the defendant, it seems that evidence would have been admissible under it to show that the wife was the authorized agent of her husband in purchasing them.

APPEAL from the County Court of *Milwaukee* County.

The complaint is as follows:

"Milo W. Brown, the plaintiff in the above entitled action, complains of *Euclid Worden*, and says that between the first day of November, 1873, and the 15th day of October, 1874, he, plaintiff, found and furnished for one Melissa M. Worden, then the wife of the defendant, at the request of the said Melissa M. Worden, necessities for her use, to the value of seventy-five dollars; that said sum thereupon, on the 15th day of October, 1874, became due therefor from the said defendant to this plaintiff; that no part thereof has been paid, although this plaintiff has at divers times requested the said defendant so to do; that said sum of seventy-five dollars remains due this plaintiff; whereupon he brings this suit and prays judgment for the said sum of seventy-five dollars with costs."

The answer is a general denial.

At the commencement of the trial, and before any testimony had been received, defendant objected to the admission

Brown vs. Worden.

of any testimony, on the ground that the complaint does not state facts sufficient to constitute a cause of action. The objection was overruled, and the trial proceeded and resulted in a verdict for the plaintiff for one dollar damages. The defendant appealed from a judgment against him entered pursuant to the verdict.

The cause was submitted on briefs.

Leander Wyman, for appellant, with *F. B. Van Valkenburgh*, of counsel, among other points, urged that the complaint was insufficient because it failed to show either that the goods sued for were furnished to or for the use, or on the account or credit, of the defendant, or that he had neglected or refused to furnish his wife any of the necessities of life.

McMullen & Houts, for respondent:

The rule of law is, that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is bound for the supply of necessities to the wife so long as she is not guilty of adultery or elopement; and "his assent is presumed to all necessary contracts upon the account of cohabiting, *unless the contrary appear.*" *Cromwell v. Benjamin*, 41 Barb., 558; *Schouler on Dom. Rel.*, 80-82; *Etherington v. Parrott*, 1 Salk., 118. The objection of the appellant is, substantially, that the complaint does not negative certain defenses that he might have had.

LYON, J. Nothing is alleged in the complaint to show that the defendant is liable for the articles therein mentioned, furnished by the plaintiff to the defendant's wife, except that they were furnished at her request, and were necessities. The claim that the defendant is liable to pay for such articles depends upon these averments alone.

A husband is not liable, *ipso facto*, for necessities furnished his wife without his consent. It is only under special circumstances and conditions that he is liable therefor. *Sturtevant v. Starin*, 19 Wis., 268; *Warner v. Heiden*, 28 id., 517;

Brown vs. Worden.

Bach v. Parmely, 35 id., 238. Hence, when a third person gives a wife credit for necessities, there can be no presumption that the husband is liable to pay for them. The facts which render him liable must necessarily be averred and proved, as all facts must upon which the cause of action depends. In this complaint no such facts are averred. Every averment which it contains may be true, and still the plaintiff may not be entitled to recover.

The complaint fails, therefore, to state facts sufficient to constitute a cause of action, and the objection made at the commencement of the trial to the admission of any testimony under it, for that reason, should have been sustained.

Had it been alleged in the complaint, as it was in *Sturtevant v. Starin*, *supra*, that the articles mentioned therein were sold or furnished to the defendant, a different question would be presented. In such case, the question of the authority or agency of the wife might arise, and it is probable that evidence would be admissible, under such a complaint, to show that the wife was the authorized agent of her husband in the transaction. But there would be no presumption that she was such agent; for a wife is not *ipso facto* the agent of her husband. *Savage v. Davis*, 18 Wis., 608.

Whether the obligation of the husband to pay for necessities furnished his wife without his consent is placed upon the ground that she is his agent for the purpose of procuring them, or solely upon the duty which grows out of the marital relation (*Bach v. Parmely*, *supra*), the result is the same. In either event, the complaint is barren of averment showing that the defendant is liable in this action.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings according to law.

Pringle vs. Dunn and others. (Motion for rehearing.)

PRINGLE vs. DUNN and others. (Motion for rehearing.)

PRACTICE: REHEARING AFTER JUDGMENT. (1) *General rule as to rehearing after judgment.* (2-4) *Rehearing in this court, after judgment on appeal.*

1. The rule of law governing all the courts of this state, including the supreme court, is, that as to all matters on which the mind of the court did act, or is presumed from the record to have acted, in the rendition of a judgment, it is precluded from altering its decision at a subsequent term, except as authorized by statute or by general rules of practice established by this court, having statutory force.
2. The provision of sec. 38, ch. 125, R. S., empowering courts, at any time within one year after notice thereof, to relieve a party from a judgment rendered against him through his mistake, excusable neglect, etc., has no application to judgments of this court on appeals.
3. This court has no power to review its own judgments on appeals after the term at which they are rendered, unless the power is carried over to a subsequent term by motion for rehearing actually made within the rule, and brought to a hearing within the term at which it is made. But this does not prevent the correction of mere mistakes in the entry of judgment.
4. Under ch. 264 of 1860 — which requires the clerk of this court to remit appeal papers to the court below within thirty days after judgment here on the appeal, unless this court directs them to be retained for the purpose of a motion for a rehearing, — jurisdiction here of an appeal ceases when the papers are so remitted; and it ceases at the end of the thirty days, even when the record is *not actually remitted*, unless it is retained here *by order of the court* under the statute.

APPEAL from the Circuit Court for *Milwaukee* County.

In this action to foreclose a mortgage, the trial court having rendered a judgment in favor of all the defendants, this court, on appeal, at the January term, 1875, held that the mortgage was valid, though not so recorded as to constitute constructive notice, and that the defendants *Molloy** and Bartoz were chargeable with *actual* notice; and it reversed the judgment

* In the former report of this case, the name of this defendant is given in the form *Maloy*.

Pringle vs. Dunn and others. (Motion for rehearing.)

below as to them. See 37 Wis., 449-468. At the January term, 1876, it appearing that the papers in the cause had never been remitted, this court, on *Molloy's* motion, directed its clerk to retain them until further order; and on the 21st of March, *Molloy* asked leave to file a motion for a rehearing as to so much of the judgment as affected him. In support of this motion affidavits of G. C. Prentiss, Esq., and John T. Clark, Esq., were read, the substance of which was, that said Clark was a defendant herein, and the judgment of the trial court in his favor was affirmed by the judgment of this court; that *Molloy* took title from Clark, through a mesne conveyance; that Clark defended on the ground that he purchased in good faith without notice of the mortgage in suit, and his deposition showing that he so purchased, and also showing his relation to *Molloy's* title, was read on the trial below, and was included in the bill of exceptions on appeal to this court; but that, through mistake and inadvertence, this deposition was not mentioned in the printed case, and the relation of *Molloy's* title to that of Clark was overlooked in the argument here. Circumstances explaining and excusing this oversight are stated at length; and it is also stated that Mr. Prentiss' attention was not called to the relation between *Molloy* and Clark until a few days before this motion was made, and that Mr. Clark had not been aware until some time in the same month of the true state of the action, or that the facts as to *Molloy's* title had not been presented to the court.

I. C. Sloan, for the motion, after commenting upon the fact that the bill of exceptions in this cause shows a complete defense in *Molloy's* favor, and insisting that the circumstances set forth in the affidavits fully explained and excused the failure of counsel to present that defense properly to this court in the first instance, and the subsequent delay in moving for a rehearing, contended further, that the statute (Tay. Stats., 1446) gives the court power, in case of a judgment rendered against a party through his "mistake, surprise or

Pringle vs. Dunn and others. (Motion for rehearing.)

excusable neglect," to relieve him therefrom within one year after its rendition. *Butler v. Mitchell*, 17 Wis., 52. Until a decree is signed and enrolled, all matters are open; and if there be any error in the decree, the court should have an opportunity of amending it. *Buck v. Farocett*, 3 P. Wms., 8, 241; *Bowker v. Hunter*, 2 Dick., 611. The appellate court does not lose jurisdiction of the cause until the remittitur is actually filed. 7 Paige, 108, 509; 52 N. Y., 653; 1 id., 239. Courts of equity should bend their rules for the sake of equity and justice. *Beach v. Fulton Bank*, 2 Wend., 225, 237. A court having jurisdiction to set aside a judgment has the right to give any less relief by which justice may be obtained, and by which the rights of a party in excusable default may be protected; and the mode of effecting this object is under the control and subject to the direction of this court. *McCall v. McCall*, 54 N. Y., 541. A court of chancery has power, even after enrolment, to open a decree regularly obtained by default, and to discharge the enrolment, for the purpose of giving the defendant an opportunity to make a defense upon the merits, where he has been deprived of such defense either by mistake or accident or by the negligence of his solicitor. *Millsbaugh v. McBride*, 7 Paige, 509; *Tripp v. Vincent*, 8 id., 176; *Beekman v. Peck*, 3 Johns. Ch., 415; 1 Barb. Ch. Pr. (ed. of 1874), 367. Rehearings in equity rest in the sound discretion of the court. *Daniel v. Mitchell*, 1 Story, 198; 2 Dan. Ch. Pr., 1554-5; *Laud v. Wickham*, 1 Paige, 256; *Jenkins v. Eldredge*, 3 Story, 299. Rehearing cannot be had after the time for making the motion has expired, and the record has been regularly remitted; but the fact that the time is past is no sufficient reason for denying the motion where the record still remains here. *Ogilvie v. Richardson*, 14 Wis., 158; *Hopkins v. Gilman*, 23 id., 512. Relief is granted for the negligence, ignorance or fraud of the party's attorney (*Sharp v. Mayor*, 31 Barb., 584); for drunkenness of the attorney (7 Rob., 74); for sickness of the defendant

Pringle vs. Dunn and others. (Motion for rehearing.)

(*Luscomb v. Maloy*, 26 Iowa, 444); for sickness of defendant's wife, and much business of his attorney. *Hill v. Crump*, 24 Ind., 291.

In *Allerding v. Cross*, 15 Wis., 530, the judgment below was affirmed here November 1, 1861; motion for leave to file a motion for a rehearing was made February 11, 1862, and allowed March 15th, and the rehearing granted on the 1st of September following.

E. Mariner, contra.

RYAN, C. J. There were numerous defendants in this cause, respondents in this court, and the record was voluminous and complicated. The appeal was argued at the bar for some five days, early in the June term, 1874, and was decided the last of May in the January term, 1875. The latter term was not finally adjourned until July; so that the time for moving for a rehearing under the rule expired in June, 1875.

The respondent *Thomas Molloy* now moves for leave to make a motion for rehearing. And the only question on the motion is, whether such leave should now be given. The merits of the appeal are not before us, as upon a rehearing, but only the question whether the appeal should be now brought again before us for rehearing. And we take the occasion to say that parties failing to move in time for rehearing cannot, by a motion for relief from this failure, make an opportunity for themselves, as was done in this case against our protest, to argue the merits of the rehearing at the bar, which the rule prohibits when the motion is made in time. The argument of such motions, as of all motions, must be confined to the merits of the motions themselves.

We did not understand counsel for the motion as expressly relying on sec. 38, ch. 125, R. S., to aid the right to move for rehearing now, on the ground of the party's mistake, inadvertence, surprise or inexcusable neglect, in not making the motion in time. But his argument indicated a reliance on that

Pringle vs. Dunn and others. (Motion for rehearing.)

section. It may be doubted whether any provision of the section was intended to apply to proceedings in this court within its appellate jurisdiction. Certainly the provision for relief against judgments for a year after notice of them, can have no application to judgments in causes which cannot remain in the court longer than thirty days, unless ordered by the court within that time to remain here for the purpose of immediate rehearing. On questions whether steps may be taken here *nunc pro tunc* in proper cases, however, we should be influenced by the statutory rule of relief, excusable neglect, etc. And we may say here that, if a motion for a rehearing of this cause should have been made by this respondent, he appears not only to have neglected to make it in due time, but to have neglected all inquiry or thought of the grounds of making it, all attention to the judgment which he asks to be reconsidered, for some nine months after it was rendered. Such long, passive inattention and indifference are surely neglect, but it would be difficult to consider it excusable. *Non dormientibus jura subserviunt*. The statute was not designed to license mere apathy in suitors. Assuming the error imputed to the judgment, such negligence, so persevering, appears to us gross and inexcusable.

The rights of the respondent making this motion were expressly passed upon by the court. *Pringle v. Dunn*, 37 Wis., 449. "It is well established by the rules of the common law, that a court has no power to review its own judgment of a previous term; that is, as to all matters on which the mind of the court did act, or is presumed from the record to have acted, in the rendition of the judgment, it is precluded from again acting, at a subsequent term, and changing its opinions or altering its decisions." *Etna Co. v. McCormick*, 20 Wis., 265. This has been the constant rule in this state. See *Scheer v. Keown*, 34 Wis., 349, and several later cases. And this court forms no exception to the rule. *Hungerford v. Cushing*, 8 Wis., 324; *Hill v. Hoover*, 5 id., 386.

Pringle vs. Dunn and others, (Motion for rehearing.)

Courts can of course take power by statute to review their judgments at subsequent terms, as in certain cases by ch. 125, sec. 38, R. S., and by general rules of practice established by this court, having statutory force. *Att'y Gen. v. Lum*, 2 Wis., 507.

In this court, judgments within its appellate jurisdiction can be reviewed only upon rehearing granted upon motion made within the rule. The original rule (3 Pin., 494) did, and the present rule (3 Pin., 503) may, carry the right to move for rehearing over to the term succeeding the judgment. That works so far an exception to the general rule that this court cannot review its judgment at a subsequent term. But when motion for rehearing is not made within the rule, and even when made but not brought to a hearing at the term at which it is made, the court is powerless to review its own judgment. *Pierce v. Kneeland*, 14 Wis., 341. And so this court has no power to review its own judgments on appeals after the term at which they are rendered, unless the power is carried over to a subsequent term by motion for rehearing actually made within the rule. Of course this does not prevent the correction of mere mistakes in the entry of judgment. *Hill v. Hoover*, *supra*.

We were referred, on the argument of this motion, to several cases showing the practice of courts of original jurisdiction elsewhere. These have no application here. Since the argument, we have been referred to *Allerding v. Cross*, 15 Wis., 530. Nothing in the report of that case is in conflict with the views here expressed, or with the cases cited in support of them. But it is true, as counsel suggests, that it appears by the record of that case that the time for moving for rehearing under the rule expired within the term of the judgment; and that leave to make the motion was granted at a subsequent term. The report of the case, and the opinion on the rehearing, take no notice of the difficulty, which was greater than that which prevailed in *Pierce v. Kneeland*, re-

Pringle vs. Dunn and others. (Motion for rehearing.)

ported in the preceding volume. And the ruling, in view of the difficulty, is so obviously in conflict with so many previous decisions against the power of the courts of this state to review their judgments at a subsequent term, amongst the rest, a very strong case decided at the same term and reported in the same volume (*Spafford v. Janesville*, 15 Wis., 474), that it appears evident that the point was wholly overlooked in *Allerding v. Cross*. The result is a latent inconsistency between that case and all other cases in this court on the subject, previous and subsequent, which leaves it without authority beyond the letter of the report. On this question, it stands like any other case which overlooks a point fatal to the determination. Had the error by the record been disclosed by the report, the uniform current of decision in this court leaves no room for doubt that the case, so far, would have been overruled long ago.

Before ch. 264 of 1860, we are not aware that any statute fixed the time for the remission of appeal papers from this court to the courts below. And this court appears to have considered its jurisdiction over appeals to have continued, for some purposes, so long as the record actually remained here. *Hopkins v. Gilman*, 23 Wis., 512; *Esty v. Sheckler*, 36 id., 434. But the statute of 1860 requires the clerk of this court to remit appeal papers to the court below within thirty days after judgment here on the appeal, unless this court directs them to be retained for the purpose of a motion for rehearing. And when the papers are so remitted, all jurisdiction here of the appeal ceases. *Hopkins v. Gilman*, *Esty v. Sheckler*, *supra*.

And we are obliged to hold that, even when the record is not actually remitted, the statute takes away the jurisdiction of this court over appeals after thirty days from judgment on them; unless the record is retained here by order of the court under the statute. The statute itself regulates our jurisdiction; not the compliance or noncompliance of the clerk with

Pringle vs. Dunn and others. (Motion for rehearing.)

its provisions. The mere omission of the clerk to remit the record, the mere accident that the appeal papers remain here notwithstanding the statute, cannot operate to continue the jurisdiction of the court against the words of the statute. We had occasion to examine this provision very fully in considering *Esty v. Sheckler*, and then came to this conclusion, although it was not necessary to express it in deciding that case. And for the purpose of facilitating motions for rehearing, we then gave general directions to the clerk to retain all appeal papers here for the full time allowed by the statute.

We must therefore hold that the court has lost all jurisdiction over the judgment on this appeal; and that we have no power to grant this motion, because it is made at a term subsequent to the judgment on the appeal, and after the time when the statute permits the record to remain here. If the judgment did injustice to the respondent making this motion, we deeply deplore that his own laches has left us powerless to correct it. The respondent was represented on the argument by two counsel of ability and learning. His case was specially presented orally and in a printed brief. All the points made for him were carefully considered and decided; and we have no doubt correctly. It is now claimed for him that another point should have been made on his behalf, which was overlooked by his counsel, and which rested on facts not appearing in the printed case. If that be so, we regret it on his account and on our own; but we cannot hold ourselves responsible for it. In the decision of causes before us, we must necessarily depend largely on the presentation of them by counsel. The duties of the bar are almost or quite as essential to the intelligent administration of justice, as the duties of the bench. With all the aid we receive from the bar, we are barely able, by incessant labor, to keep the business of the court from running in arrear. We endeavor faithfully to investigate causes before us. If we find points not raised at the bar, we pass upon them. But if, as a rule, we should de-

Pringle vs. Dunn and others. (Motion for rehearing.)

cline all reliance on the investigations of counsel, and assume to wade through all the records coming before us for all possible points arising upon them, and so perform over again the duties of the bar, we should at once so far fail in our own duties as to delay justice, which would sometimes be equivalent to denial of justice. It is in part to save us from this overwhelming labor, that printed cases and briefs are required in every appeal. We must presume, as a rule, that counsel faithfully investigate and present the rights of their clients. And if parties claim to have suffered by mistake or neglect of counsel, and seek redress through the same or other counsel, they must do so with such diligence that they can overtake the jurisdiction of the court in the cause; so that they may be again heard, without overriding the rules of law which go to the peace of society by the final end of litigation. *Interest reipublicæ ut sit finis litium*. This may be a hard case. It is said that hard cases are apt to make bad law. It is a sore temptation to us in this case, if our judgment did the injustice to the respondent imputed to it. But we must administer the law on general principles, and dare not disregard them in hard cases. We have no plenary jurisdiction to bend the law to particular cases, or to administer justice outside of its ordained forms and proceedings, as counsel invoked us to do. All human judgments are fallible, but are none the less final. And it is better that occasionally a hard judgment should be final, than that all judgments following upon litigation should remain open to inquiry whether they be hard or not. In the nervous language of Dixon, C. J.: "If such a practice were tolerated, no one knows where it would end. Parties would never be secure in their rights, and judgments would be of as little account as the course of the wind." *Spafford v. Janesville*.

By the Court. — The motion is overruled.

Baker vs. Supervisors of Columbia County.

BAKER VS. SUPERVISORS OF COLUMBIA COUNTY.

TAX CERTIFICATES: STATUTE OF LIMITATIONS. (1) *When statute may be pleaded by supervisors, on appeal from their decision.* (2) *Tax certificates void when cost of revenue stamps included.* (3, 4) *When statute begins to run as to actions on certificates.*

1. Where a claim against a county, barred by the statute of limitations, was rejected by the supervisors without any statement of the grounds of rejection, there was no abuse of discretion in permitting the supervisors to file an answer setting up the statute, on an appeal to the circuit court from their decision.
2. Tax certificates held void because the cost of revenue stamps thereon was included in the amount for which the land was sold.
3. An action on tax certificates issued May 10, 1864, held to have been barred at the expiration of six years years from that time, by ch. 112, Laws of 1867. A remark in *Wolff v. Supervisors*, 29 Wis., 79, overruled.
4. Even under secs. 26, 27, ch. 22 of 1859, the period of limitation would begin to run from the discovery of any *fact* rendering the sale invalid, and would not be suspended by mere *error of law*. But the acts of 1867 and 1868 fixed the bar at six years from the "*date of sale*."

APPEAL from the Circuit Court for *Columbia County*.

Baker filed with the county clerk his claim to recover from the county, under ch. 22, Laws of 1859, the amount of certain tax certificates, alleged to be void because each had attached to it a five-cent internal revenue stamp, the cost of which was included in the amount for which the lands were sold. The claim was disallowed by the board of supervisors, but the grounds of such disallowance were not expressed in writing. On appeal to the circuit court, the county, upon leave asked on the first day of the next term, was there allowed to file a formal answer, pleading the statute of limitations in bar of the action. An affidavit of plaintiff's attorney, read in opposition to the motion for leave to file such answer, stated that the board had not rejected the claim because barred by the statute. Upon the trial, by the court alone, plaintiff

Baker vs. Supervisors of Columbia County.

introduced in evidence tax certificates No. 1145, dated May 10, 1864; No. 1245, dated May 9, 1865; No. 743, dated May 8, 1866; No. 758, dated May 8, 1866; No. 615, dated May 14, 1867; No. 505, dated May 12, 1868. All of the certificates were in the form prescribed by law, and each had a five-cent revenue stamp affixed thereto, and it was admitted that the price of the stamp was included in the amount for which the lands were sold. Certificates Nos. 1145, 758, 615 and 505 showed that the lands therein described were bid off by one Edgerton, and the certificates were duly indorsed by him. Certificate No. 743 showed that the land therein described was bid off by one Clark, and the certificate was duly indorsed by him. Certificate No. 1245 showed that the land therein described was sold to the county, and the certificate was duly indorsed by the county treasurer. The date of assignment of the various certificates did not appear. The court found for the plaintiff, and gave judgment for the amount due upon the certificates, with interest; and from this judgment defendant appealed.

J. H. Rogers, district attorney, for appellant:

1. It was not an abuse of discretion for the court to permit appellant to file an answer setting up the statute of limitations, since appellant's counsel used due diligence and availed himself of the first opportunity after the appeal from the board of supervisors. R. S., ch. 125, sec. 38; *Tarbox v. Supervisors*, 34 Wis., 558; *Kennedy v. Waugh*, 23 id., 468; *Johnson v. Eldred*, 13 id., 482. 2. The liability of the county to repay money on an illegal tax certificate accrues at the time the money is paid on such certificate to the county; and unless the holder presents his claim within six years from the date of the certificate, he is barred by the statute of limitations. The presentation of the claim for allowance is the commencement of an action, and the decision of the board disallowing the claim is the answer. *Tarbox v. Supervisors*, *supra*. If it could possibly be held, under sec. 26, ch. 22, Laws of 1859,

Baker vs. Supervisors of Columbia County.

that the statute of limitations did not begin to run until the illegality was discovered, that law has since been repealed by sec. 1, ch. 68, Laws of 1870. This last statute says nothing about "discovery of illegality," and hence sec. 17, ch. 138, R. S., would apply. This, then, so far as tax certificates are concerned, would be a new law of limitation, and would apply to all certificates in existence at the date of the passage of the law of 1870, which still had a reasonable time to run before they would be barred.

H. W. Lee, for respondent:

If the circuit court erred in admitting the plea of the statute of limitations, either because it was not supported by any affidavit (*Sweet v. Mitchell*, 19 Wis., 529), or because it was an abuse of discretion, then this court can not review the questions of law raised by such plea. *Fogarty v. Horrigan*, 28 Wis., 142. Plaintiff's claim and statements before the board of supervisors become, in fact, his complaint; and in case of an appeal, there can be no hardship in holding that the county should not be allowed to amend its pleadings and proceedings, any more than an individual suitor, except in furtherance of justice and upon equitable terms. Plaintiff is entitled to know at the earliest moment the grounds upon which his claim is rejected. If such rejection be upon technical grounds merely, he may amend during the sitting of the board; and if the board does not at the proper time and place make known its objections to the claim, it can not afterwards be heard to plaintiff's prejudice. 2. Tax certificates can not be affected by statutes passed subsequent to the sale, and before deeds are issued. The sale is a contract with the purchaser, whose rights "are derived from the contract which the law authorized to be made." *Robinson v. Howe*, 13 Wis., 347. Any legislative act impairing the obligation of that contract would be within the constitutional prohibition.

COLE, J. The circuit court permitted the county to file an

Baker vs. Supervisors of Columbia County.

answer setting up the defense of the statute of limitations; but under the circumstances we do not think there was any abuse of discretion in allowing this to be done. The appeal was from the action of the board disallowing the plaintiff's claim, and it did not appear upon what ground the claim was rejected. It is stated in the affidavit of the attorney for the plaintiff, that the claim was not disallowed by the board because the statute of limitations had run upon it. But still, when the cause was appealed to the circuit court, it was proper enough that the grounds of defense should appear in formal pleadings. *Tarbox v. Supervisors of Adams Co.*, 34 Wis., 558.

Under the decision in *Barden v. Supervisors of Columbia Co.*, 33 Wis., 445, the tax certificates were void for the reason that the cost of the revenue stamp was included in the amount for which the land was sold; and this action, like that, is brought under the provisions of ch. 22, Laws of 1859, to recover back the money paid on these void certificates. The counsel for the county insists that the action is barred by ch. 112, Laws of 1867, and that none of the certificates come within the exception contained in this and the amendatory act of 1868 (ch. 56). In the law of 1867 it is in substance enacted, that no tax deed shall be issued on any tax certificate after six years from the day of sale of the lands for the delinquent tax; and the act further provides that "no action either at law or in equity shall be commenced on such certificate after the expiration of six years from the said day of sale." There is a proviso that the act shall not apply to a certificate owned by any county or municipal corporation, or by their assignee until the expiration of six years from the date of the assignment of the certificate. But so far as certificates Nos. 1145, 743, 758, 615 and 505 are concerned, we cannot see why this act does not bar a recovery upon them. This action is one at law brought directly upon the certificates, and comes within the very terms of the act. The oldest cer-

Baker vs. Supervisors of Columbia County.

tificate is dated May 10, 1864, and there was, therefore, more than two years for the party to bring his action after the law took effect. This was certainly a reasonable time for enforcing the right before the bar of the statute would run. The law is well settled, that a right of action already accrued may be barred, providing a reasonable time be given after the passage of the act for a party to prosecute. *Parker v. Kane*, 4 Wis., 12; *Von Baumbach v. Bade*, 9 id., 559; *Smith v. Packard*, 12 id., 371; *Howell v. Howell*, 15 id., 55; *Mecklem v. Blake*, 22 id., 495. In the opinion in the case of *State ex rel. Wolff v. The Board of Supervisors of Sheboygan Co.*, 29 Wis., 79, the remark is made that the acts of 1867 and 1868 do not profess or attempt to limit the liability of the county to refund moneys due upon defective tax certificates, to six years. This was not the real question upon which the case was decided, and in drawing up the opinion I overlooked the second clause of the section, assuming that the only object of the act was to limit the time for issuing tax deeds upon tax certificates. But further examination satisfies me that this is not the only object and intent of the act, but that it extends to an action against the county to recover money paid on invalid tax certificates, unless the case falls within one of the provisos. I therefore fully agree with my brethren that the remark made in the *Wolff case*, above referred to, is misleading, incorrect and should be overruled.

It appears that the land embraced in tax certificate No. 1245 was bid in by the county; but whether the certificate was assigned six years before the commencement of the action, the evidence does not disclose. We cannot, therefore, determine whether that certificate comes within the saving clause of the act.

In attempting to sustain the plaintiff's right to recover under secs. 26 and 27, ch. 22, *supra*, it was insisted that the statute of limitations did not begin to run until the error in the tax proceedings, or the invalidity in the certificate or tax

 Lemke vs. The Chicago, Milwaukee & St. Paul Railway Company.

deed, was "*discovered*." But the language in both the law of 1867 and that of 1868 is clear and positive that the action shall be barred "*after the expiration of six years from the said day of sale*." But were it otherwise, and did the case rest wholly upon the construction to be given secs. 26 and 27, we should be compelled to hold that they refer to a "*discovery*" of some error or mistake of fact, not to a mistake or error of law. In the case of *Hutchinson v. The Board of Supervisors of Sheboygan Co.*, 26 Wis., 402, the question was, whether the grantee in a tax deed had such clear and positive information or knowledge of a fact as to set the statute running. The majority of the court held that the information or notice which he received upon the subject of the payment of the tax did not amount to such a "*discovery*" or knowledge of the fact as would set the statute running against him. And that decision accords with our present view, that these sections have reference to "*discovery*" of some matter of fact, and not of law, which renders the tax, or sale, void.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings.

 LEMKE VS. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

PRACTICE: SPECIAL VERDICT: APPEALABLE ORDER. (1) *Special verdict inconsistent with general verdict must prevail.* (2) *Plaintiff not injured by order arresting judgment on general verdict.* (3) *Appealable order.* COMMON CARRIER. (4) *Railway not liable for loss of goods by fire after reasonable time to remove them from depot.* (5) *Goods presumed ready for delivery at any time after receipt at destination.* (6) *Reasonable time to remove goods, when question for jury; when for court.* (7) *Defendant not liable on the case stated.* (8) *Absence of consignee does not extend time of liability of carrier.*

1. Where there is a special finding of facts inconsistent with the general ver-

Lemke vs. The Chicago, Milwaukee & St. Paul Railway Company.

dict for the plaintiff, the former must control, and defendant is entitled to judgment. R. S., ch. 132, sec. 32.

2. In such a case the plaintiff is not injured by an order of the court merely arresting judgment for the plaintiff on the general verdict, even if it is irregular to arrest judgment in a civil action, under the code.
3. An order arresting judgment in plaintiff's favor *held* not appealable where it appeared that plaintiff was not entitled to such judgment.
4. Where goods carried by a railroad company to their place of destination and there deposited in its warehouse, are kept safely for the consignee until he has had reasonable time to remove them, and are afterwards destroyed by fire, the company is not liable for them as a common carrier.
5. In the absence of proof to the contrary, the presumption is that goods are ready for delivery to a consignee at any time after they are received at the carrier's depot at their place of destination.
6. The question whether the consignee had a reasonable time to remove his goods should be submitted to *the jury*, under proper instructions, when there is a conflict of evidence in respect to material facts bearing upon it, or when the facts are doubtful or complicated and the court cannot satisfactorily determine their weight or importance. But when the facts are few and simple, and are conclusively established by a special finding or by the undisputed evidence, the question of a reasonable time is *for the court*.
7. Plaintiff's goods, shipped by defendant's road to Watertown, were received at the Watertown depot at 5.30 P. M., of Saturday, and were destroyed by fire in said depot about noon of the following Tuesday. *Held*, that plaintiff had a reasonable time to remove the goods, and defendant was not liable as a carrier.
8. The fact that the consignee was absent from Watertown during most of the period between the arrival and destruction of the goods, could not extend the time during which defendant held them as a common carrier.

APPEAL from the County Court of *Milwaukee* County.

On Friday, December 4, 1874, the plaintiff delivered to the defendant company at Milwaukee, for shipment, three boxes of medicine of the value of \$190, consigned to his agent, Emil Stellmacher, at Watertown, and notified the latter, by mail, of such shipment. Stellmacher received the notice by due course of mail, and on Saturday, December 5th, at three o'clock P. M., called at the depot of the defendant in Watertown for the goods, but the same had not then arrived there. The goods arrived at Watertown at 5.30 P. M. on the 5th, and were

Lemke vs. The Chicago, Milwaukee & St. Paul Railway Company

placed in the defendant's depot, where they remained uncalled for until the Tuesday following, on which day the depot and goods were destroyed by fire, without fault of the defendant. This action is for the value of the goods thus destroyed.

On the trial, the jury found for the plaintiff, and assessed his damages at the value of the goods. At defendant's request, the court instructed the jury to find upon certain questions of fact. Those questions, and the findings of the jury thereon, are as follows:

"1. Did the goods in question arrive at the depot at Watertown on December 5th at 5½ o'clock P. M?" "Yes."

"2. Did they remain in the depot until about 20 minutes past 11 o'clock in the forenoon of the 8th day of December after their arrival?" "Yes."

"3. Were said goods burned by a fire which consumed the depot and its contents, which took or commenced about 20 minutes past 11 o'clock in the forenoon of December 8th?" "Yes."

"4. Did the plaintiff or his agent call at the depot or the office in Watertown for said goods, after their arrival on the 5th, and prior to the time that they were consumed?" "No."

"5. If you find the defendant guilty of negligence as a warehouseman, you are required to state in what the negligence consisted." "No."

"6. What was the value of the goods shipped?" "\$189.80."

"7. If you find for the plaintiff, do you find the defendant liable as a common carrier or as warehouseman?" "As common carrier."

A motion in arrest of judgment was made on behalf of the defendant, on the ground that such special findings entitle the defendant to judgment. The plaintiff appealed from an order granting this motion.

The case was submitted on briefs.

McMullen & Houts, for appellant:

1. The motion in arrest of judgment is a common law mo-

Lemke vs. The Chicago, Milwaukee & St. Paul Railway Company.

tion, and is abrogated by the code. Secs. 16, 17, ch. 132, R. S. (Tay. Stats., 1498), are substantially the same as secs. 264, 265 of the New York code, and the courts of that state, in construing those sections, hold that the motion in arrest is abrogated by intendment. *Snell v. Snell*, 3 Abb. Pr., 426; *Duel v. Agan*, 1 Code R., 134. 2. If the motion in arrest is not abrogated, it can only be sustained for errors apparent upon the face of the record not amendable or aided at common law or by the statute. *Smith v. Smith*, 4 Wend., 468. And in this case there is no error upon the record. The general verdict for plaintiff settles all the questions put in issue by the pleadings and litigated upon the trial, in his favor, unless some fact specially found was inconsistent therewith. R. S., ch. 132, sec. 14 (Tay. Stats., 1497); *Smith v. Phelps*, 7 Wis., 211; *Goldsmith v. Bryant*, 26 id., 34; *Eldred v. Oconto Company*, 33 id., 133. And there is nothing in the special findings inconsistent with the general verdict for plaintiff. The question of reasonable time for the consignee to take the goods from the carrier's possession, after they are ready for delivery, is one of fact for the jury, under instructions. *Wood v. Milwaukee & St. Paul R'y Co.*, 27 Wis., 541; *Parker v. Same*, 30 Wis., 689.

Melbert B. Cary, for respondent:

A motion in arrest of judgment should be granted in any case by the court, whenever any objection or defect or inconsistency that is not amendable appears upon the face of the record. *Rowen v. Taylor*, Burnett, 74; *Wood v. Hustis*, 17 Wis., 416. Common law practice is still in force except so far as it has been expressly or by implication abrogated by statute or by rules of court. *Noxon v. Bentley*, 7 How. Pr., 316; *Wood v. Hustis*, *supra*. The inconsistency between the general and special verdicts is a substantial defect, apparent on the face of the record, not amendable, and is good cause for arresting judgment.

To warrant the jury in finding defendant liable as a common

Lemke vs. The Chicago, Milwaukee & St. Paul Railway Company.

carrier, they must find that after the goods had arrived at their destination, the consignee has not had a reasonable opportunity to take them away. *Wood v. Crocker*, 18 Wis., 345. The consignee in this case should have called for his goods on Monday, after having received the notice of shipment, or at least on Tuesday morning, at either of which times he would have found his goods ready to be delivered. He failed to use reasonable diligence. The consignee cannot be allowed to prolong the time during which the carrier shall remain liable as an insurer. *Hedges v. Hudson River R. R. Co.*, 49 N. Y., 223. And see as to question of reasonable time, *Burnell v. New York Central R. R. Co.*, 45 N. Y., 184. It is well settled that "the question of reasonable time or diligence, when there is no dispute as to the facts, or when the disputed facts are all settled, is purely a question of law." *Parker v. Railway Co.*, 30 Wis., 689; *Witbeck v. Holland*, 45 N. Y., 13; *Hedges v. Hudson River R. R. Co.*, *supra*; *Roth v. R. R. Co.*, 34 N. Y., 553, and cases there cited.

LYON, J. If the special finding of facts is inconsistent with the general verdict for the plaintiff, the former must control such verdict, and the defendant is entitled to judgment. R. S., ch. 132, sec. 32. The county court held that the special finding is inconsistent with the general verdict, but did not give, and was not asked to give, judgment for the defendant. By arresting judgment, the court merely refused to give judgment for the plaintiff on the general verdict in his favor, and there stopped. If the court took the correct view of the special finding of facts, the defendant asked for and obtained only a portion of the relief to which it was entitled, and was entitled to all that it obtained. Hence, conceding for the purposes of the case, what counsel for the plaintiff claim, that, under the code, it is irregular to arrest judgment in a civil action (a proposition not here determined), it is apparent that the plaintiff was not injured by the practice adopted in this

Lemke vs. The Chicago, Milwaukee & St. Paul Railway Company.

case, if the court determined correctly the effect of the special finding. Indeed, it would seem that he is benefited thereby to the extent of the defendant's costs, which, as a matter of course, he would be adjudged to pay were there a judgment for the defendant.

The controlling question in the case is, therefore, Do the facts found specially by the jury entitle the defendant to judgment? If this question be answered in the affirmative, the order appealed from should not be disturbed; if in the negative, the order should be reversed.

The general verdict for the plaintiff rests entirely upon the hypothesis that the defendant held the plaintiff's goods as a common carrier, and not as a warehouseman, when such goods were burned. The case is destitute of evidence showing, or tending to show, that the defendant was guilty of any negligence which caused or contributed to the destruction of the goods; and it is understood that the answer to the fifth question submitted to the jury negatives the existence of any such negligence. So if the defendant held the goods, when the same were burned, as a warehouseman only, it is not liable for the loss of them. *Wood v. Railway Co.*, 27 Wis., 541.

The special finding of facts shows conclusively that the goods arrived at their destination on Saturday, December 5th, at 5.30 P. M., and remained in the defendant's depot uncalled for until destroyed, and that the fire which destroyed them commenced on Tuesday, December 8th, at about 11.20 A. M. The goods were shipped to Watertown within a reasonable time after they were delivered to the defendant at Milwaukee to be so shipped; and, in the absence of proof to the contrary, the presumption is that they were ready for delivery to the plaintiff's consignee at any time after they were received at the depot. This gave the latter all of Monday the 7th, and until nearly noon of the 8th of December, to take the goods from the depot. If that was a reasonable time for that purpose, the liability of the defendant as a common carrier in

Lemke vs. The Chicago, Milwaukee & St. Paul Railway Company.

respect to the plaintiff's goods had ceased when the goods were burned. It is worthy of consideration, although not a controlling fact in the case, that the consignee was at the depot but a few hours before the goods arrived there, and knew that they might reasonably be expected on any future train, yet he failed to call for them again until after the fire on the 8th, having (as he testified) gone some miles into the country on his own or the plaintiff's business. Such absence cannot operate to increase the liability of the defendant, or to extend the time during which it held the goods as a common carrier. Within the rule laid down in *Wood v. Crocker*, 18 Wis., 345, we are of the opinion that the consignee had a reasonable time, after the arrival of the goods at Watertown and before they were destroyed, in which to remove them from the defendant's depot.

But it is argued by the learned counsel for the plaintiff, that the question of reasonable time is for the jury; and they cite cases decided by this court to sustain the position. The rule doubtless is, that whenever there is a conflict of testimony in respect to material facts bearing upon the question, or when the facts are doubtful or complicated and the court cannot satisfactorily determine their weight or importance, the question as to whether a reasonable time has or has not elapsed should be submitted to the jury, under proper instructions. But when, as in this case, the facts relating to the question are few and simple, and are conclusively established by a special finding or by the undisputed evidence, it is for the court to say whether a reasonable time has or has not elapsed for the performance of a given act.

We hold, therefore, that it appears conclusively by the record, that the plaintiff or his consignee had, before the loss of the goods, a reasonable time in which to take them from the depot, and that the defendant is not liable for such loss.

The order arresting judgment "in effect determines the action, and prevents a judgment from which an appeal might

Brewster and another vs. Carmichael.

be taken" (Tay. Stats., 1635, § 11); and if it also affected a substantial right of the plaintiff, he might appeal therefrom. But inasmuch as the order gives the defendant less than it is entitled to, and deprives the plaintiff of nothing to which he is entitled, it cannot justly be held to affect a substantial right of the plaintiff, or, in any manner, to involve the merits of the action. For these reasons, and following the practice established in *Noonan v. Orton*, 30 Wis., 609, and *Freeman v. Transportation Co.*, 36 id., 571, we must dismiss the appeal.

By the Court. — Appeal dismissed.

BREWSTER and another vs. CARMICHAEL.

REPLEVIN: LOGS: DAMAGES. (1) *When court may direct verdict for plaintiff in replevin.* (2) *Proof of value of stumpage rejected, and statutory rule of damages applied.* (3) *Identification of the property.* (4) *When action of replevin treated as action of trover.*

1. In replevin for logs, where it appears that they were cut for defendant, without authority, on land of another person; that they afterwards passed into defendant's possession; that the owner of the land sold and conveyed them to the plaintiffs, who duly demanded them of the defendant; and that the latter refused to deliver them on such demand, or to pay for them, the court may direct a verdict for the plaintiffs.
2. Proof of the value of the stumpage may be rejected, and the rule of damages prescribed by ch. 263, Laws of 1873, applied, even where the logs were cut before that statute was enacted, and also before the decision of *Single v. Schneider*, 30 Wis., 570, which led to it.
3. In replevin, where the property has been seized by the sheriff and then returned to defendant, under the statute, plaintiff, on proof of the unlawful taking and detention of the property described in the complaint, and of its value, may take judgment for such value with damages for the detention, without showing the identity of the property seized by the sheriff with that taken by the defendant.
4. In such cases, the action is regarded as a concurrent remedy with trover, and to be governed by the same rules.

Brewster and another vs. Carmichael.

APPEAL from the Circuit Court for *Chippewa* County.

Replevin, for logs. The action was originally brought against three defendants, but was dismissed as to two of them, on the trial. The complaint, in addition to other averments usually found in complaints in similar actions, also alleged that the defendants had willfully intermingled said logs with others of the same description and mark, belonging to themselves. Answer, a general denial.

The provisional remedy given in such actions by statute (R. S., ch. 128) was resorted to by the plaintiffs to obtain immediate delivery of the logs in controversy; and to the requisition upon the sheriff to take the property, etc., that officer returned that he had seized the same. The appellant thereupon procured a return of the logs to himself by complying with the requirements of the statute in that behalf. On the trial, the court refused to allow the defendant to prove the value of stumpage at the time when, and in the locality where, the logs were cut. At the close of the trial the court directed the jury to return the following verdict: "We, the jury in this action, find for the plaintiffs that they are the owners of the property described in the complaint; that the value thereof is \$689.50; and assess \$80 damages for the detention thereof; and that the plaintiffs are entitled to a return thereof." The plaintiffs elected to take judgment under the statute (ch. 124, Laws of 1869; Tay. Stats., 1504, § 39) for the value of the property, and not for a return thereof, and for damages; and, after remitting ten per cent. of such value and damages as found by the jury, they took judgment for the remaining ninety per cent. thereof. Defendant appealed from the judgment.

The case is further stated in the opinion.

The cause was submitted for the appellant on the brief of *Bailey & McCaslin*, who argued, 1. That there was no proof to sustain the verdict. Plaintiff must identify the property claimed by him, with reasonable certainty; such

Brewster and another vs. Carmichael.

certainty that the judgment can be pleaded in bar to a suit by another. It must be clearly shown that the logs taken were those described in the complaint. 35 Wis., 644. This does not appear in this case, nor is there any proof that defendant had possession of the property described in the complaint; and replevin can only be maintained against those in possession. 25 Wis., 705; 31 id., 533; 12 Barb., 347. 2. Prior to the passage of ch. 263, Laws of 1873, the rule of damages was the value of the stumpage (24 Wis., 299; 29 id., 345; 30 id., 570); and that law does not affect actions of this character for trespasses committed before its passage, notwithstanding the fact that it provided, in general terms, a rule of damages in all such actions *thereafter commenced*. It is a general principle, that statutes are never construed to act retrospectively, unless such intention is unmistakable. Such an intention is not to be inferred from the fact that general language is used which might include past transactions as well as future ones. 15 Wis., 548; 21 id., 268; 36 id., 195; 2 Hill, 238; 8 Wend., 661; 4 Denio, 376; 2 Seld., 463; 15 N. Y., 595; 24 id., 23; 23 Wend., 481-2; *Salters v. Tobias*, 3 Paige, 344; 10 Ohio, 385-390; 17 id., 127; *Kelly v. Kelso*, 5 Ohio St., 198. 3. The court erred in directing the verdict. The value of the timber, when and by whom it was cut, whether defendant ever had possession of it, and whether he refused to deliver it on demand, were all proper questions for the jury. *Etna Insurance Co. v. Northwestern Iron Co.*, 21 Wis., 464.

J. M. Bingham, for respondents, argued that there was sufficient proof of *Carmichael's* possession of the logs, and even if actual possession were not proven, there was abundant evidence of constructive possession, which is sufficient to sustain an action of replevin. *Gallagher v. Bishop*, 15 Wis., 276; *Grace v. Mitchell*, 31 id., 533. 2. The evidence shows that plaintiff demanded the logs of defendant before action brought; but if no demand had been made, the action could still be sustained. *School District v. Zink*, 25 Wis., 636.

Brewster and another vs. Carmichael.

3. The value of the stumpage is not the true measure of damages. Laws of 1873, ch. 263; *Webster v. Moe*, 35 Wis., 75.
4. The court did not err in directing a verdict for plaintiffs, as there was no evidence whatever for the defense, and the only testimony that could raise any question as to the value was found in the statement of one witness that he "should call these trees at ten per cent. discount." This was remedied by plaintiffs remitting from the verdict ten per cent. of the whole amount found by the jury.

LYON, J. Numerous reasons are given for a reversal of the judgment appealed from; but the case is controlled by a few facts and principles, which can best be stated and applied without attempting to refer, in detail, to the alleged errors assigned for the appellant.

The undisputed evidence given on the trial proved conclusively, that in the winter of 1871-2, one McCann cut a quantity of logs for the defendant on lands belonging to one Crowley, without any authority whatever; that the logs afterwards passed into the possession of the defendant; that in October, 1872, Crowley sold and conveyed the same logs to the plaintiffs, who duly demanded them of the defendant; that the latter refused to deliver them on such demand, or to pay for them; and that the value of the logs, when this action was commenced, was greater than the amount of the judgment therefor recovered by the plaintiffs.

Under these circumstances, we think the court properly directed the jury to find for the plaintiffs; and if the jury were directed to assess the value of the logs and the damages at too high figures, the error was abundantly cured (unless an incorrect rule for ascertaining such value was applied) by the discount therefrom of ten per cent., and the rendition of judgment for the reduced sum only.

This brings us to inquire whether the proper rule was applied to ascertain the value of the logs. The court rejected

Brewster and another vs. Carmichael.

proof of the value of stumpage; and it is entirely clear that the rule prescribed by ch. 263, Laws of 1873, was applied for that purpose. The cause of action arose before the enactment of that statute, and also before the decision of *Single v. Schneider*, 30 Wis., 570, which led to it. In *Webster v. Moe*, 35 Wis., 74, there is a strong intimation that the rule of the statute ought to be applied in all actions for the wrongful cutting of timber, whether the cause of action accrued before or after the statute was enacted; and it was applied in that case to a cause of action older than the statute, so far as was necessary to sustain the rulings of the court below, but not to the full extent of the statutory rule. Surely the maxim *stare decisis* cannot be invoked to control the rule of damages in an action for a tort; and there are very cogent reasons why the statutory rule should have prevailed always. At any rate, after the legislature has settled the policy of the state in that behalf, no good reason is perceived why the courts should not adopt and enforce that policy in all cases, without regard to the date of the trespass. Hence, we think the correct rule was applied in this case, when the court allowed the plaintiffs to recover on the basis of the value of the logs at the commencement of the action, which is clearly within the statutory rule.

It follows from the foregoing views that the court properly rejected proof of the value of stumpage. It is understood that logs, like wheat and many other staples, have at all times a market value, which can readily be ascertained without resorting to proof of the cost of production. And it seems to be as unnecessary to show the value of stumpage in order to ascertain the value of logs, as it would be to show the cost of plowing the ground upon which it was grown in order to fix the market price of wheat.

But it is said that there is no sufficient proof that the logs seized by the sheriff are the identical logs cut by McCann upon Crowley's land. It seems to be claimed by counsel for the

appellant that such proof is essential to the maintenance of the action. This view is untenable. The logs replevied were returned to the defendant, and, manifestly, the parties are in the same position in respect to them as they would have occupied had the property not been seized and returned, in which case there is no doubt whatever that the action might have proceeded to judgment for the plaintiff for the possession of the property, or for its value in case delivery thereof could not be had. In *Dudley v. Ross*, 27 Wis., 679, it was held that replevin can be maintained under our present law in any case where goods are wrongfully taken from the possession of the owner, even though the statute expressly prohibits the owner from resorting to the provisional remedy therein provided to obtain immediate delivery of the property. The truth is, when, as in the present case, the property seized in replevin has been returned to the defendant, and the plaintiff takes judgment absolutely for the value thereof and damages for the detention, the action of replevin "performs the functions and accomplishes the results of an action of trover," and no good reason is perceived why, in such cases, replevin and trover are not concurrent remedies, governed by the same rules. *Bigelow v. Doolittle*, 36 Wis., 115, is authority for this position.

We conclude, therefore, that it is entirely immaterial in the present case, whether the sheriff seized the logs described in the complaint or some other logs, on the provisional proceeding in that behalf. And it is also immaterial whether the defendant intermingled the logs in controversy with others having the same mark upon them, as charged in the complaint. The gist of the action is the alleged unlawful taking and detention of the logs by the defendants, and such taking and detention are abundantly proved by undisputed evidence.

By the Court. — The judgment of the circuit court is affirmed.

Swearingen vs. Robertson.

SWEARINGEN VS. ROBERTSON.

Statute of Limitations.

In case of an adverse possession of land, when the statute of limitations begins to run against the ancestor, it will continue to run against the heir, although he is under the disability of infancy when the right accrues to him. R. S., ch. 138, sec. 13.

APPEAL from the Circuit Court for *Columbia* County.

Ejectment, commenced July 7, 1874. Plaintiff (who brought suit by her guardian *ad litem*) showed that she was the daughter of Thomas A. Swearingen, deceased; that the latter died in 1855; and that she was in her twentieth year at the commencement of this action; and she introduced in evidence a patent from the United States to the said Thomas A. Swearingen of the premises in controversy.

Defendant, having pleaded the statute of limitations, introduced evidence tending to prove that the land was sold for taxes in 1850, and a tax deed was issued thereon to one Wood, in 1853; that Wood conveyed the premises to Thomas Robertson Sen., by quitclaim deed, dated February 6, 1854, and recorded March 16, 1854; that said Robertson also obtained a sheriff's deed of the premises in March, 1854, upon a sale under a judgment in his favor against Thomas Swearingen; that said Robertson went into possession of the premises in 1853, and remained in possession until his death in 1872; that he devised his real estate to his son *Thomas Robertson Jr.*, the defendant, who went into possession in 1872, upon the death of his father, and had remained in possession ever since.

Plaintiff introduced some evidence in rebuttal, tending to invalidate the tax deed and sheriff's deed above mentioned.

The court charged the jury, among other things, as follows: "In relation to the statute of limitations, I charge you that if you find that Thomas Robertson went into the possession

Swearingen vs. Robertson.

of the land before the death of Thomas A. Swearingen, and that those deeds [the sheriff's and the tax deed] were executed to Robertson before Swearingen's death, and that Thomas Robertson continued in the adverse possession of the land from the time he entered, or from the time of the execution of those deeds, and for ten years thereafter continuously, the statute of limitations ran in his favor, and this action cannot be maintained."

Verdict and judgment for defendant; and plaintiff appealed.

T. L. Kennan, for appellant, contended that, even if the statute of limitations began to run against Thomas A. Swearingen during his life, it would not continue to run on against his heir laboring under disability. Such a construction would defeat the very object of the law in a large class of cases. Sec. 13, ch. 138, R. S., was enacted as a general exception or saving clause for the protection of all persons laboring under any of the disabilities therein named. That portion of the section which says: "If a person entitled to commence any action for the recovery of real property, etc., be, at the time such title shall first descend or accrue, within the age of twenty-one years," etc., means when the title shall first descend or accrue *to him*, that is, to the person within the age of twenty-one years, or under the disability. It does not say when the *right of action* first accrues, but "when the *title* shall first *descend* or *accrue*." Had the legislature intended to make an exception of all cases where the statute of limitations should commence to run against a person not under disability, they would have expressed it in the statute. It is conceded that when a statute of limitations once begins to run against a person not under disability, any subsequent disability will not suspend it, and this doctrine has caused some judges to fall into the error of holding that where the statute has begun to run against the ancestor, it continues to run against the heir, notwithstanding the title descends to one under disability. It is certain that our statute does not say

Swearingen vs. Robertson.

that, and equally certain that it does not mean that. The saving clause in the statute of Kentucky is not worded exactly like ours, but its meaning is the same. See title 117, p. 1125, vol. 2, Kentucky Statutes of 1834. And the supreme court of that state, in a very carefully considered case, say: "The English statute saves the right or title of entry of those who were or shall be infants, etc., 'at the time when said right or title first descended, accrued, come or fallen.' * * * From the expressions used in the saving clause of the English statute, it obviously relates to the time when the right first accrued, and the courts of that country have properly extended it only to the persons to whom the right then accrued, and not to those to whom it should afterwards come. * * * But the saving in our statute evidently relates to the time when the right accrues or comes to those laboring under the disabilities therein mentioned, and not to the time when the right first accrued to those under whom they derive their right." *Machir v. May*, 4 Bibb, 44, sustained and confirmed in *Sentney v. Overton*, id., 445. See also *Floyd's Heirs v. Johnson*, 2 Litt., 114, where the chief justice uses the following language: "We have not forgotten that it has been decided by this court that under our statute, if a right of action accrues to one laboring under no disability, and by his death the right descends upon his heir, who does labor under some disability, the right of the latter will be saved until ten years after such disability is removed; but we have never decided that one disability can be added to another." And such is the true construction of the statute of Wisconsin.

J. H. Rogers, for respondent:

Adverse enjoyment began under both sections of the statute during the lifetime of Thomas A. Swearingen, and the running of the statute of limitations was not suspended by his death, and the infancy of the heir would not stop the running of the statute, or in any way extend the limitation. *North v. Hammer*, 34 Wis., 425; *Demarest v. Wynkoop*, 3 Johns. Ch.,

Swearingen vs. Robertson.

129; *Eager v. Commonwealth*, 4 Mass., 182; *Jackson v. Moore*, 13 Johns., 513; *Jackson v. Robins*, 15 id., 169; *Bucklin v. Ford*, 5 Barb., 393; *Carpenter v. Shermerhorn*, 2 Barb. Ch., 314; *Butler v. Howe*, 1 Shep., 397; *McFarland v. Stone*, 17 Vt., 165; *Downings' Heirs v. Ford*, 9 Dana, 391; *Doe v. Barksdale*, 2 Brock., 439; *Den v. Richards*, 3 Green, 347; *Fewell v. Collins*, 3 Brev., 286. Sec. 13, ch. 138, R. S., has not changed the rule. That section is nearly an exact transcript of the New York statute, which had long ago received the same construction as that put upon ours by the court below. *Fleming v. Griswold*, 3 Hill, 85. This decision was in 1841, before our statute was adopted. The statute, having been enacted and construed by the courts of New York before adoption here, must be received with the construction there placed upon it. *Draper v. Emerson*, 22 Wis., 147.

COLE, J. The controlling question in this case arises upon the statute of limitations. The circuit court instructed the jury, in substance, that if they found that adverse possession began to run against the ancestor of the plaintiff, it continued to run against the plaintiff, notwithstanding she was under the disability of infancy when the right accrued to her. If the court was correct in this construction of the statute, the action cannot be maintained. The provision under which the question arises, reads as follows: "If a person entitled to commence any action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents or services out of the same, be, at the time such title shall first descend or accrue, * * * within the age of twenty-one years, * * * the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action, or the making of such entry or defense; but such action may be commenced, or entry or defense made, after the

Swearingen vs. Robertson.

time limited, and within five years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced, or entry or defense made, after that period." Sec. 13, ch. 138, R. S. With the exception of some verbal changes or alterations which do not affect the meaning, this provision is a transcript from the statutes of New York (2 R. S., N. Y., 1829, p. 295, sec. 16). Says KENT, C. J., in *Peck v. Randall*, 1 Johns., 165, decided in 1806: "The general rule is, that when the statute of limitations once begins to run, it continues to run, notwithstanding any subsequent disability." p. 176. The case of *Jackson v. Moore*, 13 Johns., 513, decided in 1816, holds that "where an adverse possession begins to run in the lifetime of the ancestor, and descends to an infant heir, the latter is not protected by his disability." In *Fleming v. Griswold*, 3 Hill, 85, decided in 1842, the court said they "considered the rule entirely settled, that when the statute has begun to run against the ancestor or other person under whom the plaintiff claims, it continues to run against the plaintiff, notwithstanding any disability when the right accrues to the latter." And the court remarked that the revised statutes, or sec. 16 above referred to, had not changed the law on the subject, and declined to hear the question discussed.

The provision under consideration will be found in the territorial revision of 1839, and the revision of 1849 (Territorial Statutes of 1839, p. 260, § 13; R. S. 1849, ch. 127, sec. 12). When it was first adopted in New York we are unable to say; but it will be seen that long before it was enacted here it was well settled in that state, as it was in England, that if an adverse possession commences in the lifetime of the ancestor, it will continue to run against the heir notwithstanding any existing disability on the part of the latter when the right accrues to him or her (*Jackson v. Robins*, 15 Johns., 169); and this uniform construction of the statute of limitations ought not now to be disturbed. We must presume the law was en-

Swearingen vs. Robertson.

acted here in view of this judicial construction and generally received opinion on the subject. See Tillinghast's *Ballantine* on Lim., p. 59 and notes; Adams on Eject., p. 99; Angell on Lim., § 477.

We were referred by counsel for the plaintiff to some decisions in Kentucky in support of the position that though the statute had begun to run against the ancestor of the plaintiff, still it did not run against her after his death, by reason of her disability. But the saving clause in the statute of that state was in favor of those who were or shall be infants, etc., "at the time when the said right or title accrued or coming to them." And it has been held that "if the statute begins to run against the ancestor, but by his death the land descends to his heirs, who are infants, the statute does not run on, but the infants shall have the time allowed by the statute after arriving at full age to bring this action." *Machir v. May*, 4 Bibb, 43; *May's Heirs v. Bennett*, 4 Litt., 314; *McIntire's Heirs v. French's Heirs*, 5 id., 35. In *Machir v. May*, BOYLE, C. J., points out the difference between the English and Kentucky statutes, and shows that the saving clause in the former relates to the time when the right *first* accrued; while in the latter "it evidently relates to the time when the right accrues or comes to those laboring under the disabilities therein mentioned, and not to the time when the right *first* accrued to those under whom they derive their right." This, of course, is a most important difference. Our statute is similar to the English statute, the saving clause only extending to the person on whom the right *first* descends or accrues.

It follows from these views that the ruling of the circuit court was correct; and the judgment must therefore be affirmed.

By the Court. — Judgment affirmed.

Supervisors of Omro vs. Kaime and others.

SUPERVISORS OF OMRO VS. KAIME and others.

TOWN TREASURER: BOND: SURETY. (1) *Failure to approve bond does not relieve treasurer or sureties.* (2) *Liability of surety in case of annual office.* (3) *Duty of town supervisors in appointing treasurer on vacancy.* (4) *When treasurer and sureties liable after expiration of original term.* (5) *Liability for loss through failure of bank.*

1. The omission of the chairman of town supervisors to formally approve the town treasurer's bond as required by law, does not relieve the treasurer or his sureties from their liability on the bond.
2. The liability of a surety cannot be indefinitely extended; and in case of an annual office, the surety is presumed to contract for the faithfulness of the officer only for the year for which he was chosen, and such further time as is reasonably sufficient for the election and qualification of his successor.
3. The statutory provision (Tay. Stats., 363, § 76), that if a town treasurer shall refuse to serve, or if his office shall become vacant, the town supervisors "shall forthwith appoint a treasurer," does not require the board to act on the very day when the time for the treasurer elect to qualify expires without his having done so; especially where he has up to that day manifested an intention to serve.
4. Under the laws of this state, a town treasurer holds his office for one year and until his successor is elected and qualified; and where such a treasurer, being elected his own successor, manifested an intention to hold for the second term, by taking the oath of office and filing his bond, but without sureties, and continued to act as such treasurer nearly two months after the time limited by law for qualifying for the second term, and neglected to pay over, to the successor then appointed, the moneys of the town in his hands: *Held*, that both he and his sureties were liable on his first bond, especially as the moneys for which he was in default came to his hands during his first term, and were during that term deposited in a bank, and were lost by the failure of such bank within one week after the expiration of the time given him to qualify for the second term.
5. Where a town treasurer deposits the town money in a bank without authority of law, and it is lost by failure of the bank, he and his sureties cannot defend on the ground that he was not guilty of want of care or diligence in making such deposit.

APPEAL from the Circuit Court for Winnebago County.

Supervisors of Omro vs. Kaime and others.

This was an action against *Kaime*, as town treasurer, and the sureties upon his official bond, to recover funds of the town which were lost through the failure of the bank wherein they were deposited by *Kaime*. *Kaime* was first elected town treasurer April 7, 1873, and on the 8th of April took the oath of office and filed the bond on which his codefendants in this action were sureties. This bond was never formally approved by the chairman of the board of supervisors, as required by the statute. *Kaime* entered upon the duties of his office, and received moneys of the town, which he deposited with the private banking firm of Howard & Co., upon their agreement to pay him interest on the deposits. The account of *Kaime* with the bank, as treasurer, was kept separate from his individual account. On the 7th of April, 1874, *Kaime* was reelected treasurer, and filed a bond without sureties, which was never approved. He was requested by the supervisors to procure sureties, which he failed to do, but continued in possession of the office until June 6, 1874, when the board of supervisors declared the office vacant because of *Kaime's* neglect to file a bond with proper sureties, and elected one Bushnell to fill the vacancy. The latter filed his bond, with sureties, approved by the chairman, and took possession of the office June 15, 1874. *Kaime* received no public moneys after his second election. On the 24th of April, 1874, the banking firm of Howard & Co. failed, and Howard absconded. None of the town funds deposited in the bank were recovered, and the action was brought to recover the deficiency. The referee before whom the cause was heard, held that all the defendants became liable on the first bond for such moneys as came into *Kaime's* hands as treasurer after his election in April, 1873, and until his office became vacant by his failure to qualify under his election in 1874; and that plaintiffs were entitled to judgment against all the defendants as prayed for in the complaint.

Supervisors of Omro vs. Kaime and others.

The court confirmed the report, and gave judgment accordingly, from which the defendants appealed.

C. W. Felker, for appellants:

1. The sureties were not liable beyond the term for which *Kaime* was elected in April, 1873. The obligation of a surety is a matter of strict law, and can never arise by implication. 24 Wis., 521; 9 Wheat., 680. A surety on the official bond of an officer whose term is limited to a year, is not liable beyond the year, though the officer continues by law until his successor is provided. *Dover v. Twombly*, 42 N. H., 59; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Hassell v. Long*, 2 M. & S., 363; *Mayor v. Horn*, 2 Harring. (Del.), 190; *County of Wapello v. Bingham*, 10 Iowa, 39; *Welch v. Seymour*, 28 Conn., 387; *Arlington v. Merrick*, 2 Saund., 404; *Kitson v. Julian*, 30 Eng. L. & E., 326; *Peppin v. Cooper*, 2 B. & Ald., 431. The statute provides that the town treasurer shall take the oath and file his bond within ten days after his election. Tay. Stats., 361, § 67, and 370, § 113. It was the duty of the supervisors, at the expiration of ten days after *Kaime's* second election, when they knew that he had not filed a proper bond, to at once declare the office vacant, and appoint a new treasurer. The statute provides that they shall *forthwith* appoint, etc. Tay. Stats., 363, § 76. *Forthwith* does not mean from April 18th to June 6th, nor even from April 18th to April 24th. The word has so often received judicial construction, that it cannot be extended, even to accommodate the negligence of town supervisors. *Kaime* was, therefore, undoubtedly treasurer until June 6, 1874, although he had failed to file a proper bond. Dillon on M. C., 193, § 153. And the defalcation having occurred after the year had expired for which the sureties were bound, and after the supervisors should, by law, have appointed another treasurer, it seems clear that the sureties were not bound. 2. The moneys having been converted by Howard,

Supervisors of Omro vs. Kaime and others.

without fault of the treasurer, the latter is not liable. It is true that there is a great preponderance of authority against this proposition. But the court will observe that in many of the cases great stress is laid upon the words that the officer will "safely keep" the money, etc. The condition of the bond in this case is, that he will "properly and legally disburse or pay all moneys that may come into his hands," etc. Does this condition bind him to more than reasonable diligence in case of the money of the town? See *Ross v. Hatch*, 5 Iowa, 159, and cases there cited; *Supervisors v. Dorr*, 26 Wend., 440, and cases there cited.

H. B. Jackson, for respondent:

1. The power to approve or disapprove the bond is only for the better security of the public, and the validity of the bond does not in any way depend upon the approval. 7 Mo., 81.
2. The loaning or depositing of the money with Howard during *Kaime's* first term, and the fact that it was thereby lost and never returned to him, constituted an unlawful conversion of the money during the first term. Defendants would therefore be liable on the bond for the first year, even though *Kaime* had duly qualified and entered upon the second term, and had not been holding over under his first election. No money came into his hands after the second election, and all had passed out of his hands by such loaning before that time, and the liability of the sureties follows from the rule laid down in *Vivian v. Otis*, 24 Wis., 518. But *Kaime*, not having qualified for the second term, never became his own successor, and continued to hold under the first election, as of the first term. Tay. Stats., p. 362, § 71; *State v. Washburn*, 17 Wis., 658.
3. Even when public money is taken by force and feloniously from the treasurer, without any fault on his part, this is no defense to an action on his bond. *Halbert v. State*, 22 Ind., 125; *Morbeck v. State*, 28 id., 86; *Muzzy v. Shattuck*, 1 Denio, 233; *U. S. v. Prescott*, 3 How., 578.

Gabe Bouck, on the same side:

Supervisors of Omro vs. Kaime and others.

1. The statute requiring the approval of the treasurer's bond by the chairman of the supervisors is merely directory, and is for the benefit of the town, and not for the treasurer or his sureties, nor can they take advantage of the omission. *People v. Johr*, 22 Mich., 461, and cases there cited; *People v. Smyth*, 28 Cal., 21; *Auditor v. Woodruff*, 2 Ark., 73; *Stephens v. Crawford*, 3 Ga., 499; *State v. McAlpin*, 4 Ired. Law, 140; *State v. Hampton*, 14 La. An., 725; *Stevens v. Treasurer*, 2 McCord (S. C.), 107; *Mendocino County v. Morris*, 32 Cal., 145; *Taylor v. Auditor*, id., 174; *U. S. v. Maurice*, 2 Brock., 96; *State v. Lynch*, 6 Blackf., 395; *State v. Bowman*, 10 Ohio, 445; *Warren v. Phillips*, 30 Barb., 646; *Skellinger v. Yendes*, 12 Wend., 306. If the bond is not good as a statutory bond, it is as a common law bond. *Goodrun v. Carroll*, 2 Humph., 400; *Lord v. Lancy*, 21 Me., 468; 1 Ga., 574; 3 id., 499; 9 id., 314. 2. The defense that there was no lack of care and diligence will not avail. A town treasurer is an insurer, liable for all losses, even if stolen from him; his liabilities are not limited to those of bailee. *United States v. Prescott*, 3 How., 587; *Same v. Morgan*, 1 id., 160; *Same v. Dashiell*, 4 Wall., 185; *Thompson v. Board of Trustees*, 30 Ill., 99; *Hancock v. Hazzard*, 12 Cush., 112; *Ohio v. Harper*, 6 Ohio St., 607; *Commonwealth v. Comley*, 3 Pa. St., 372. *Ross v. Hatch*, 5 Iowa, 144, turned on the peculiar condition of the bond in that case, and is inapplicable here. *Supervisors v. Dorr*, 25 Wend., 440, has been overruled. *Muzzy v. Shattuck*, 1 Denio, 233. See also the notes to 7 Hill, 584. 3. The mere delay in appointing a successor, or settling, will not release the sureties. *People v. Jenkins*, 17 Cal., 300. The sureties in this case are liable for the money received by Kaime during the first year, until he duly paid it out or over to his successor, as required by law and his bond. The courts go further, and hold that where the law provides that an officer shall hold until his successor is elected and qualified, his bond covers his acts so long as he holds. *Thompson v.*

Supervisors of Omro vs. Kaime and others.

The State, 37 Miss., 518; *Freedolders v. Wilson*, 16 N. J. Law (4 Harr.), 110

COLE, J. The condition of the bond executed by the defendants is essentially the same as that prescribed in sec. 113, ch. 15, Tay. Stats., p. 370. It was, that the town treasurer would "faithfully discharge the duties" of his office, and "properly and legally disburse or pay all moneys" that might come into his hands. The statute made it the duty of the chairman of the board to approve the bond given, and to indorse his approval thereon. The chairman failed to formally approve the bond as the law required, but this omission of duty on his part cannot have the effect to release either the treasurer or his sureties from their liability on the obligation. The provision is obviously for the protection of the town, and was intended to secure it against the risk of an insufficient bond.

The first error relied on for a reversal of the judgment is the ruling of the court that the sureties were liable for the defalcation of the treasurer. It is said by the learned counsel for the defendants, that the principle is well settled that the obligation of a surety is a matter of strict law, never arising by implication; and that this principle, when applied to the facts of this case, exonerates the sureties from liability. There is no controversy as to the correctness of this rule of law, but only as to its application to the case at bar. It appears that the defendant *Kaime* was elected town treasurer on the 7th of April, 1873, and on the 8th took the oath of office, and filed his bond, on which his codefendants were sureties. In April, 1874, *Kaime* was reelected, took the oath of office, and filed with the town clerk a bond in due form, but without sureties. This bond was not approved by the chairman of the board. It is an admitted fact that *Kaime* gave no bond with sureties for his second term, although requested by the officers of the town so to do. He continued to act, however, as

town treasurer, until one Bushnell was appointed treasurer, and entered upon the duties of the office June 15, 1874. During the year 1873, *Kaime* had deposited the money of the town, together with his own funds, with one Howard, doing business as a banker at Omro, and who failed and ran away about the 24th of April. In consequence of the failure of Howard, the money of the town was lost; and we have no doubt that under these circumstances the sureties are responsible for it.

Under the statute, *Kaime* held his office for one year and until his successor was elected and qualified. Sec. 71, ch. 15, *supra*. And, though elected as his own successor, he failed to qualify for the second term by giving a proper bond within the time prescribed by statute. Sec. 67. This amounted to a refusal to serve, and an abandonment of the office. Sec. 68. The sureties contracted for the faithful discharge of the duties of the office by *Kaime*, and that he would properly and legally disburse and pay over the money of the town which should come to his hands. He has been guilty of a breach of duty, and has certainly failed to pay over to his successor the moneys of the town. The evidence clearly shows that *Kaime* loaned these moneys to Howard, or deposited them in Howard's bank, during his first term, and that in fact he received no money of the town after his reelection. Under these circumstances we see no valid reason for holding that the sureties are released from all liability to make good the default of the treasurer. It is said by defendant's counsel that a surety on the official bond of an officer whose term is limited to a year is not liable beyond the year, though the officer continues to hold until his successor is chosen and qualified. And a number of cases are cited in support of this position. It is not considered necessary to examine these authorities in detail, for we do not intend to lay down any rule really in conflict with them. The liability of a surety cannot be indefinitely extended. When the office is annual, it may well be

Supervisors of Omro vs. Kaime and others.

presumed that the surety contracts for the faithfulness of the officer "only for the year for which he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor," as held in *Chelmsford Co. v. Demarest*, 7 Gray, 1. See also the case of *Dover v. Twombly*, 42 N. H., 59. Under our system of popular elections, great inconvenience would arise if the term of one officer were to terminate before another commenced; and the statutes are framed to avoid any interval or vacancy. And as time must necessarily elapse after an election to enable the officer elect to express his acceptance and qualify, it must be presumed that the sureties contracted that the old officer would perform his duty until a reasonable period was allowed for doing these things. It is conceded that *Kaime* had until the 18th of April to file a proper bond for the second term. It is said that it was the duty of the supervisors on that day, upon ascertaining that he had not filed his bond with sureties, to have declared the office vacant, and to have appointed his successor. This they might have done, undoubtedly, under sec. 76. But though this provision declares that when a treasurer refuses to serve, the board "shall forthwith appoint a treasurer," this language is to have a reasonable construction. It is not to be interpreted as requiring the board to act on the very day the time to qualify expired; more especially when the treasurer elect had manifested an intention to serve, as *Kaime* had done. For it was not until after the failure of the bank on the 24th of April, that he indicated his purpose not to file a bond with sureties.

The other point relied on for a reversal of the judgment is, that as the treasurer had been guilty of no want of care and diligence in depositing the money in bank, the defendants ought not to be held liable for its loss. The counsel frankly admitted that there was a great preponderance of authority against this position; and the concession is in accordance with the fact. Upon this question we cannot do better than quote

Andrews, Executrix, vs. Jenkins and others.

the language of Mr. Justice McLEAN in pronouncing the decision of the court in *The United States v. Prescott et al.*, 3 How., 578. He says: "Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. * * No such principle has been recognized or admitted as a legal defense." p. 588. And we have certainly no disposition to relax the rule of liability on the part of treasurers entrusted with public moneys, by recognizing such a principle as a legal defense to an action upon their official bonds.

By the Court.—The judgment of the circuit court is affirmed.

ANDREWS, Executrix, vs. JENKINS and others.

INSTRUCTIONS TO JURY. (1) *When plaintiff not injured by erroneous instructions.*

SALE: PERSONAL PROPERTY. (2) *When purchaser takes free from prior incumbrance.* (3) *Case stated and rule applied.*

EVIDENCE. (4) *Parol evidence admissible to show that conveyance of personalty was to secure advances.*

1. Where the undisputed evidence in a case would justify a direction to the jury to find for defendant, plaintiff cannot be injured by erroneous instructions.
2. One who purchases personal property in good faith, for value, of the general owner in possession, without notice, actual or constructive, that it is incumbered, will hold it discharged of any prior incumbrance.
3. K. agreed in writing to sell A. all the pine timber on a certain tract of

Andrews, Executrix, vs. Jenkins and others.

land for a specified price. The next day, A. and G. entered into a written contract in respect to the same timber, which stated that G. proposed to go upon said tract and cut, drive and deliver at a certain boom all merchantable pine timber thereon; that for so doing G. should have what the logs would bring over and above the cost at the place of sale; and that, to keep the business through the winter, A. would advance money to carry it on, and all things provided or purchased with A.'s money should be his property until all debts and liens were paid. *Held*, that under such contract A. had only a special interest in or lien upon the logs for the amount of his advances, and G. was the general owner.

4. *It seems* that parol evidence was admissible to show that A. took the conveyance of the timber from K. for G., as security for A.'s advances to G.

APPEAL from the Circuit Court for *Winnebago* County.

Replevin, for a quantity of pine logs. The facts, as they appeared on the trial, are as follows: By an instrument in writing dated December 7, 1870, one Ketchum agreed to sell to the plaintiff's testator, George R. Andrews, all the pine timber on a certain forty-acre tract of land for \$5,000, payable as therein specified. It is not disputed that Andrews paid for the timber as agreed. It was proved without objection, and the evidence is uncontradicted, that the contract with Ketchum for the purchase of this timber was made by and for the firm of Wm. Gill & Son, and the contract therefor was made in the name of Andrews as security for moneys which he had advanced and was to advance thereafter, for Gill & Son, to pay for the timber. Immediately after the execution of the agreement of December 7, Andrews and Gill & Son entered into a contract in writing in respect to the same timber, as follows:

"Messrs. Wm. Gill & Son propose to go on to the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 7, Town 25, Range 13, in Waupaca county, Wis., and cut, drive and deliver at the boom, on Wolf river, well rafted, all the merchantable pine timber thereon; and for so doing the parties above named shall have what the logs will bring over and above the cost at the place where they are sold. And to keep the business through the winter,

Andrews, Executrix, vs. Jenkins and others.

the undersigned will advance, from time to time, what may be necessary to carry along the business; all things furnished, provided or purchased with the money of the said G. R. Andrews to be his property until all debts, dues and liens are paid.

"Dated December 8, 1870.

G. R. ANDREWS,

"WM. GILL & SON."

During the winter of 1870-71, Gill & Son cut on said land, rafted to market, and sold, logs to the amount of \$8,800, and paid to Andrews \$5,000 thereof, which was all he demanded on account of his advances to them and for their benefit. No account of such advances was ever stated between the parties to the above contract, and it does not appear that any account thereof was kept by either of them. Neither does it appear that any further advances were made under said contract by Andrews after the receipt by him of the \$5,000, which was probably in the spring or summer of 1871.

During the winter of 1871-72, Gill & Son cut about 300,000 feet of logs on the same land, ran them to market, and sold them as they did the previous year. The logs in controversy are a part of such 300,000 feet. They were sold by Gill & Son to one Haight in September, 1872, and in March following were sold by Haight to the defendants, who paid the market price for them. The defendant did not know, and it does not appear that Haight knew, that Andrews had any claim on the logs. Due demand was made of the defendants for the logs before this action was commenced.

The defendants had a verdict and judgment; and the plaintiff appealed.

Charles Barber, for appellant:

The contract between Andrews and Gill & Son was nothing more than a contract that the latter should cut, drive and deliver the pine timber mentioned in the complaint. Neither the contract itself, nor the evidence introduced to interpret it, shows or tends to show that Andrews was to part with his title

Andrews, Executrix, vs. Jenkins and others.

to the logs, or that Gill & Son were to have any interest in the timber. Even if the court should construe the contract between Andrews and Gill & Son to be a bill of sale, it was certainly a conditional one. The contract provides, "all things furnished, provided or purchased with the money of the said G. R. Andrews, to be his property until all debts, dues and liens are paid." If the agreement was that Andrews should furnish the timber and the money necessary to cut and drive the logs under this contract, the logs were to be his property until all debts and dues were paid. It is well settled that when the buyer is bound by the contract to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the buyer's possession. And in this case the payment of all advances was a condition precedent to the passing of the title. Gill & Son not having paid those advances, the condition was not performed, and the title remained in Andrews. Benjamin on Sales, 336; *Hunter v. Warren*, 1 Wis., 141; *Ballard v. Burgett*, 40 N. Y., 314; 2 Kent's Com., 498; *Coggill v. Hartford & N. H. R. R. Co.*, 3 Gray, 545; *Hirschorn v. Canney*, 98 Mass., 189; *McNeil v. Tenth Nat. Bank*, 55 Barb., 69; *Hotchkiss v. Hunt*, 49 Me., 213; *Baker v. Hall*, 15 Iowa, 277; *Hart v. Carpenter*, 24 Conn., 427; *Day v. Bassett*, 102 Mass., 445; 105 id., 255. It is well settled that the title of the vendor is preferred to that of a *bona fide* subpurchaser. 2 Kent's Com. (12th ed.), 498, note; 98 Mass., 149; *Kenney v. Planer*, 3 Daly, 131. It was the manifest intent of the parties that Andrews should hold, and by the terms of the agreement he did hold, the title to the logs till all debts were paid, debts for money advanced to put in the logs, as well as to buy the timber. And the court erred in charging that Andrews' interest in the logs, if any, was a special one. That question should have been passed upon by the jury.

Andrews, Executrix, vs. Jenkins and others.

Gabe Bouck, for the respondents, argued that Andrews' only interest in the property was a special one, as security, in the nature of a mortgage for his advances, and the relation of vendor and vendee never existed between Andrews and Gill & Son. Their relation being that of mortgagor and mortgagee, it was void as to *bona fide* purchasers. If Andrews was a vendor, and it was only a conditional sale, and if there was anything due to Andrews from Gill & Son, it was incumbent upon the plaintiff to show the fact and the amount. *Leighton v. Stevens*, 19 Me., 154.

LYON, J. We are not concerned to inquire whether the instructions which the learned circuit judge gave the jury are correct in every particular, because we are satisfied that the undisputed evidence would have justified a direction to the jury to find for the defendants, and hence an erroneous instruction could not possibly injure the plaintiff.

The evidence proves conclusively that George R. Andrews, the plaintiff's testator, had, at most, but a special interest in the logs in controversy, which interest was a lien upon the logs for any unpaid balance of advances made by him pursuant to the contract of December 8th; and so the jury were instructed. While such balance remained unpaid, probably Andrews might lawfully have taken possession of the logs, as against Gill & Son. Yet Gill & Son were the general owners of the logs, subject only to the lien for such advances, and their possession of them was never interfered with by Andrews. Indeed the latter permitted Gill & Son to run the logs to market and sell them as their own, without (so far as it appears) taking any steps to protect his interests, or to inform purchasers of his rights.

It is too well settled to admit of argument or doubt, that if the general owner of personal property, having possession thereof, sell and deliver it to a person who has no notice, actual or constructive, that the property is incumbered, but

Cary and another vs. Allen and another.

who purchases it in good faith for value, such purchaser will hold the property discharged of any prior incumbrance. This principle is decisive of the present case. The defendants purchased the logs in controversy in the market, and paid for them the market price, without notice, either actual or constructive, that Andrews had or claimed any lien upon or interest in them; and this after the property had been held by their vendor six months from the time he purchased the same of Gill & Son. On the undisputed facts of the case we are clearly of the opinion that Andrews in his lifetime was, and the plaintiff is, estopped from asserting any claim to the logs, and hence, that this action cannot be maintained.

The position that Andrews had only a special interest in or lien upon the logs in controversy, may well rest upon the contract of December 8th, without resorting to parol testimony. Yet, on the authority of *Kent v. Agard*, 24 Wis., 378, and *Wilcox v. Bates*, 26 id., 465, no good reason is perceived why parol proof is not admissible to show that Andrews took the conveyance of the timber from Ketchum for Gill & Son as security for his advances to them. Construing the two contracts of December 7th and 8th in the light of such parol evidence, there seems to be no room to doubt that the only interest which Andrews had in the logs in controversy was a lien or incumbrance thereon in the nature of a mortgage, for his unpaid advances.

By the Court.—The judgment of the circuit court is affirmed.

CARY and another vs. ALLEN and another.

LIBEL. (1) *Requisites of complaint where words charged are of uncertain meaning.* (2, 3) *What words are libelous.*

1. In an action for libel, where it is uncertain what words charged mean,
VOL. XXXIX. — 31

Cary and another vs. Allen and another.

and to whom they refer, the complaint should contain averments showing their meaning and their reference to the plaintiff.

2. Words which have a direct tendency to injure a person in reputation, to degrade and disgrace him in society, and to bring him into public contempt and ridicule, are libelous.
3. Defendants, in a newspaper article, after stating the defalcation, frauds and disappearance of one H., said: "It is currently rumored that Mrs. B. [one of the plaintiffs] has gone with H., or has some connection with his disappearance. It is said that Mrs B. left shortly before H.'s departure, ostensibly for the purpose of visiting Washington, and since that time her family have telegraphed to her and for her repeatedly, but can receive no tidings whatever of her whereabouts. H. was known to have possession of considerable of her money at the time he absconded, and the fact of her leaving and subsequent reticence, coupled with this, has given rumors to the effect that they had concocted a scheme to meet at some appointed time and place, and have gone together. For the lady's sake it is but proper to give but little credence to such a suspicion, until further developments shall prove it well founded." *Held*, libelous.

APPEAL from the Circuit Court for *Winnebago County*.

Action for libel, originally brought by *Mrs. Florence A. Beckwith*, who subsequently intermarried with one *Cary*, who was then joined as a plaintiff in the suit. The complaint alleged that the defendants *Allen* and *Hicks* were editors, proprietors and printers of the "Daily Northwestern," a daily newspaper published in the English language, in the city of Oshkosh, and of general circulation in that city; that plaintiff was the widow of the late Nelson Beckwith (mentioned in the article hereinafter set forth), and that she was a single woman and had been such since the death of her husband; and that defendants published, issued and put in circulation in the daily issue of their said paper the following article:

"DEEPER DYED."

"The A. H. Howard matter deepening into dark deeds. Forgery discovered. Grave suspicions of a woman at the bottom of it.

"The more the affairs of Asa H. Howard are developed into,

Cary and another vs. Allen and another.

and the deeper down the investigations are pushed, and the more that circumstances divulge, the more astounding are the facts and figures brought to light, until a clear case of the most hellish and diabolical fraud is unearthed that ever afflicted this part of the country. To add to the barefaced robbery which has wrung from the widow her little mite, and from the laborer his little all, and the farmer his hard earned gains, comes the stinging revelation that he has betrayed his friends, swindled his associates, deserted his family, and criminated himself under the garb of extraordinary piety, and through the hypocritical professions of morality, virtue and religion. And the matter is more stinging to those who have been gulled, from the fact that they allowed him to pull the wool over their eyes by a show of such virtues.

"It now transpires that he has left behind him the evidences of forgery to increase still the weight of his enormities. A Mr. Brown, of Berlin, now presents a note for \$1,800, made out by A. H. Howard, payable to G. W. Shaffer, indorsed by Shaffer, and the name of W. W. Race written across the face. Mr. Brown, or rather his daughter, Mrs. Beckwith, it appears, bought this note of A. H. Howard, or took it as security, and now demands payment from the indorsers of the same. Both Mr. Shaffer and Mr. Race positively declare the note a forgery, and decline to pay it. We are informed, however, on good authority, that the law will compel them to pay it, the note now being in an innocent party's hands. How many more of such notes or papers may yet turn up, it is, of course, impossible to tell. The liabilities begin to accumulate so fast that it is now figured up that the total liabilities on debts and deposits will not fall short of \$65,000.

"There is another phase of the affair which is growing current in rumor and belief, and that is, that there is a woman mixed up in it. Were it not already the theme of conversation in Omro, we would desist of a mention of it, as we can look upon it at present only in the light of groundless appre-

Cary and another vs. Allen and another.

hension. It is currently rumored that Mrs. Beckwith, widow of the late Hon. Nelson Beckwith, has gone with Howard, or has some connection with his disappearance. It is said that Mrs. B. left shortly before Howard's departure, ostensibly for the purpose of visiting Washington, and since that time her family have telegraphed to her and for her repeatedly, but can receive no tidings whatever of her whereabouts. Howard was known to have possession of considerable of her money at the time he absconded, and the fact of her leaving, and subsequent reticence coupled with this, have given rumors to the effect that they had concocted a scheme to meet at some appointed time and place, and have gone together. For the lady's sake, it is but proper to give but little credence to such a suspicion, until further developments shall prove it well founded."

The complaint further alleged that the Mrs. Beckwith mentioned in said article was the plaintiff, and that all reference therein to Mrs. Beckwith was intended for her and for no other person; that every portion of the article referring to plaintiff was false and malicious, except the statement therein that "Mr. Brown, or rather his daughter *Mrs. Beckwith*, it appears, bought this note of A. H. Howard, or took it as security, and now demands payment of the indorsers," and the words, "Howard was known to have possession of considerable of her money at the time he absconded;" that said publication by defendants was malicious, and by reason thereof plaintiff had been brought into great public scandal and disgrace, and greatly injured in her good name and reputation, and otherwise injured, to her great damage. The second count of the complaint contained the same allegations, and was for a publication of the same article in the weekly issue of defendants' paper.

The answer denied the malice, and set up facts in mitigation of damages.

Upon the trial, defendants objected to the introduction of any evidence, because the complaint did not state a cause of

Cary and another vs. Allen and another.

action. The court sustained the objection, and dismissed the complaint; and the plaintiffs appealed.

Gabe Bouck, for appellant:

1. A publication which tends to injure one's reputation in the common estimation of mankind, to throw contumely, shame or disgrace upon him, or which tends to hold him up to scorn, ridicule or contempt, or which is calculated to render him infamous, odious or ridiculous, is *prima facie* a libel, and implies malice in the publication. 1 Hill. on Torts, 266; Add. on Torts, 777; Town. on Slander, sec. 22 and notes; *White v. Nicholls*, 3 How. (U. S.), 266; *Cramer v. Noonan*, 4 Wis., 231; *Lansing v. Carpenter*, 9 id., 540; *Brown v. Remington*, 7 id., 462. So, also, is every publication injurious to private character (Add. on Torts, 776; *Dunn v. Winters*, 2 Humph., 512; *Melton v. State*, 3 id., 389); or that reflects upon character (*O'Brien v. Clement*, 15 M. & W., 435; *Johnson v. Stebbins*, 5 Ind., 364); or that injures social character (1 Am. Lead. Cas., 138); or that induces an ill opinion (*Hillhouse v. Dunning*, 6 Conn., 391); or that imports a bad reputation. *Cooper v. Greeley*, 1 Denio, 347. So with all defamatory words, injurious in their nature. *Chaddock v. Briggs*, 13 Mass., 248. 2. In construing a publication alleged to be libelous, the scope and object of the entire article are to be considered, and such a construction is to be put upon the language as would naturally be given it. The test is, whether to the mind of an ordinary person the tenor of the article and the language used naturally import disgrace. *More v. Bennett*, 48 N. Y., 472. And it is only where the words do not, of themselves, fairly charge the offense, that extrinsic averments are necessary. *Cooper v. Greeley*, *supra*; *More v. Bennett*, *supra*; *Croswell v. Weed*, 25 Wend., 621.

C. W. Felker, for respondents:

There is no averment or *colloquium* showing that Howard and *Mrs. Beckwith* went away together for any criminal, unlawful or illicit purpose. When the publication does not

Cary and another vs. Allen and another.

impute a crime, and the language is not actionable *per se*, the writing must be such on its face as to tend to bring the party into public hatred, contempt or ridicule. Unless the nature of the charge is such that the court can see and legally presume that plaintiff has been held up to contempt or ridicule, or that she has suffered loss to her character or business, plaintiff must aver such special damage as she has sustained by reason of the falsity of the publication. *Stone v. Cooper*, 2 Denio, 293; *Pugh v. McCarty*, 40 Ga., 444; *Bennett v. Williamson*, 4 Sandf., 60. The article in question charges nothing against *Mrs. Beckwith*, except that she went away with Howard. It does not impute anything disgraceful or criminal to her. In actions for libel the language is to be construed as decent, fair minded, and intelligent men would construe it. There being no extrinsic averments showing that it was improper for plaintiff to go away with Howard, there is nothing in the complaint tending to show that the article would excite any feeling but that of pity or compassion for the plaintiff; and for this the action will not lie without an averment of special damage. *Mayrant v. Richardson*, 1 N. & McC., 348; *Boynton v. Remington*, 3 Allen, 397.

COLE, J. We think the publication set forth in the complaint is libelous. It is not clear upon its face that it charges the plaintiff with being connected with or implicated in the frauds and crimes committed by Howard. There is considerable ambiguity in the language used in the commencement of the article, and it is doubtful what it means, or to what it refers. The ambiguity might have been explained by a proper averment or colloquium making clear what is doubtfully expressed. The article commences as follows: "Deeper Dyed. The A. H. Howard matter deepening into dark deeds. Forgery discovered. Grave suspicions of a woman at the bottom of it." The article then proceeds to speak of the affairs of Howard, and to comment on his crimes, frauds and mis-

Cary and another vs. Allen and another.

conduct as brought to light by the investigations. But whether the article means to charge that a woman — and that woman the plaintiff,—was at the “bottom” of all these frauds and crimes as an instigator or accomplice, or whether it only means that a woman was in some way connected with Howard’s matter, it is difficult to say. But if it was intended to claim that the publication charged the plaintiff, *Mrs. Cary*, with being connected with the forgery and other crimes of Howard as a confederate or instigator, it seems to us that correct pleading required an averment or colloquium “to ascertain that to the court which is generally or doubtfully expressed,” and to show that the language referred to the plaintiff. See *Van Vechten v. Hopkins*, 5 Johns., 211; *Cramer v. Noonan*, 4 Wis., 231; *Brown et al. v. Remington*, 7 id., 462. As the complaint now stands, it is uncertain what these words mean, and to whom they refer.

But, passing from this point, we think the publication is clearly libelous on the ground that it has a direct tendency to injure the female plaintiff in her reputation, to degrade and disgrace her in society, and to bring her into public contempt and ridicule. Says Chief Justice WHITON, in *Cramer v. Noonan*, *supra*: “We understand from all the authorities, that a malicious publication which accuses one of a crime, or blackens his character, and exposes him to public hatred, contempt and ridicule, is libelous.” *Lansing v. Carpenter*, 9 Wis., 541. That such is the nature and effect of the publication under consideration, must be apparent on slight examination. For the article proceeds to state, in substance, that “it is currently rumored that *Mrs. Beckwith*, the widow of the late Hon. Nelson Beckwith, has gone with Howard, or has some connection with his disappearance. It is said that *Mrs. B.* left shortly before Howard’s departure, ostensibly for the purpose of visiting Washington, and since that time her family have telegraphed to her and for her repeatedly, but can receive no tidings whatever of her whereabouts. Howard was known

Cary and another vs. Allen and another.

to have possession of considerable of her money at the time he absconded, and the facts of her leaving and subsequent reticence, coupled with this, have given rumors to the effect that they had concocted a scheme to meet at some appointed time and place, and have gone together. For the lady's sake it is but proper to give but little credence to such a suspicion until further developments shall prove it well founded."

It seems to us no intelligent person can read this article without seeing that its necessary effect was to disgrace and degrade *Mrs. Beckwith* in public estimation and esteem; to lower her in, or to exclude her from, society; and to bring her into contempt and ridicule. The learned counsel for the defendants insists that there is nothing in the publication which charges that Howard and *Mrs. Beckwith* went away for any criminal, unlawful or illicit purpose. It is true, the article does not impute to *Mrs. Beckwith* any sexual immorality or criminal conduct; but it does directly charge, or imply, that she had either gone away with, or had appointed a time and place to meet, a man, who, it was alleged, had committed forgery, had been guilty of frauds, had betrayed his friends, had deserted his family; who was, in short, a man of such a character that no respectable woman could associate with him anywhere without social degradation; or without, as the books say, bringing her into hatred, contempt and ridicule. Indeed, it seems to us that no charge—except, perhaps, the imputation of being an unchaste woman,—was better calculated to injure the reputation of *Mrs. Beckwith*, and impair her standing in society, than the conduct attributed to her in the publication. If she was not his accomplice or confederate, she certainly could not secretly go off with, or make arrangements to meet anywhere, a man such as Howard is represented to be, without placing herself in a most odious and degrading connection. There can be no doubt that, upon well settled principles, a publication which imputes to her such conduct is libelous. *Rice v. Simmons*, 2 Harr., 417; *Colby v. Reynolds*, 6 Vt., 489.

Walters vs. The St. Joseph Fire & Marine Insurance Company.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

WALTERS VS. THE ST. JOSEPH FIRE & MARINE INSURANCE
COMPANY.

FIRE INSURANCE. *Cancellation of policy. Estoppel.*

Plaintiff, having insurance in a Chicago company on certain property for five years from February 14, 1874, for which he had paid the premium in full, procured from the defendant company a policy of insurance for three years on the same property for the same amount, dated January 5, 1875, paying the premium therefor, and delivering to defendant the Chicago policy with an indorsement requesting the Chicago company to cancel it; and this policy, thus indorsed, was immediately mailed by defendant's agent, for the plaintiff, to the Chicago company. The property was destroyed by fire March 19, 1875, and afterwards plaintiff received a notice from the Chicago company, dated January 10, but postmarked March 20, 1875, that it refused to cancel the policy. *Held*, that said policy had been cancelled by plaintiff on his part; that the Chicago company, by its silence for two and a half months, and until after the property was destroyed, was estopped from denying that it had assented to the cancellation; and that defendant is liable for the loss, even if the validity of its policy depended upon such cancellation.

APPEAL from the Circuit Court for *Winnebago* County.

Action upon a policy of insurance. The facts, as shown by the pleadings and proofs, are these: The plaintiff had an insurance in the American Fire Ins. Company of Chicago, on his dwelling house and contents, to the amount of \$600, for a term of five years from February 14, 1874, for which he paid the premium in full. Becoming distrustful of the solvency of that company, he applied to the defendant company to take a risk on the same property, and the latter company issued to him a policy thereon, dated January 5, 1875, for the same

Walters vs. The St. Joseph Fire & Marine Insurance Company.

amount, for three years. The plaintiff paid the premium demanded for such insurance, and the company delivered the policy to him. At the same time the plaintiff produced the American Company policy, and signed an indorsement written thereon by the agent of the defendant, in these words: "Enclosed please find my policy, which I would like cancelled." The policy, with the indorsement thereon, was immediately mailed by such agent, for the plaintiff, to the American Company at Chicago.

The insured property was destroyed by fire March 19, 1875. After the fire, and on or about March 22, the plaintiff received a letter from the secretary of the American Company, dated January 10, but postmarked March 20, 1875, refusing to cancel the policy.

As a defense to the action the defendant averred in its answer, and introduced testimony on the trial tending to prove, that the policy in suit was delivered to the plaintiff on the express condition that it should not take effect until the policy issued by the American Company should be cancelled by that company. The circuit judge submitted that question to the jury, and instructed them that if such was the condition of the contract, and if that company refused to cancel the policy, the plaintiff could not recover. The judge also overruled the claim, that, if liable at all, the defendant was only liable *pro rata* with the American Company.

The jury found for the plaintiff, and assessed his damages at \$530.56, which was the whole amount of his loss. A motion for a new trial was denied, and judgment for the plaintiff was entered pursuant to the verdict.

Charles Barber, for appellant, argued that the contract of insurance with the American Insurance Company could not be cancelled by either party thereto, without the consent of the other. May on Ins., 68, § 67; Flanders on Ins., 170; *Alliance Mut. Ins. Co. v. Swift*, 10 Cush., 433; *Sands v. Hill*, 42 Barb., 651; *Aetna Ins. Co. v. Maguire*, 51 Ill., 342; *Fab-*

Walters vs. The St. Joseph Fire & Marine Insurance Company.

yan v. Union Mut. Ins. Co., 33 N. H., 233; *Goit v. Ins. Co.*, 25 Barb., 189; *Peoria F. & M. Ins. Co. v. Botts*, 47 Ill., 516; *Boland v. Whitman*, 33 Ind., 64; *Van Valkenburg v. Lennox Fire Ins. Co.*, 51 N. Y., 465; *Wilkins v. Tobacco Ins. Co.*, 1 Cinc., 349; 1 Addison on Con. (Am. ed.), § 361. An insurance policy cannot be cancelled by either insurer or insured, without placing the other party *in statu quo*. It is well settled that a request or notice of cancellation by the company, without a return of, or an offer to return, the premium, amounts to nothing. Flanders on Ins., 171; Marcy on Ins., § 574; *Hathorn v. Germania Ins. Co.*, 55 Barb., 28; 51 Ill., 342. And the reverse of the rule is also true, that a mere request on the part of the insured to cancel the policy, without waiving all claims upon the unearned premiums, or against the company for loss, amounts to nothing. What was there to prevent the plaintiff's compelling the American Company to return him the unearned premium, or even compelling it to pay the amount of the loss in case the property were destroyed by fire before the company annulled the policy? 45 Ga., 244; 51 N. Y., 165; 1 Cinc., 349; 56 Mo., 591. Assuming, then, that at the time of the loss plaintiff was insured in both companies, the loss must be borne by both companies *pro rata*, there being a clause to this effect in both policies. Flanders on Ins., 46; *Fitzsimmons v. City Fire Ins. Co.*, 18 Wis., 234.

Gabe Bouck, for respondent:

The American policy was invalid, because plaintiff voluntarily and unconditionally surrendered it when insured by defendant. The insured is at liberty to retire from the contract at any time, having entered into no obligation to remain insured for any length of time. Even if the American company had the right to keep its policy alive, it is estopped by retaining the policy in silence so long after it had been returned with the request to cancel. The first policy having become void, the one in suit must sustain the whole loss.

Church vs. Smith, impleaded.

Hygum v. Ins. Co., 11 Iowa, 21; *Forbush v. Ins. Co.*, 4 Gray, 337.

LYON, J. By returning his policy to the American Company for cancellation, the plaintiff cancelled it on his part; and by retaining the policy two and one-half months, and until after the insured property had been destroyed by fire, without objection to its cancellation, the American Company, by such delay and silence, consented thereto and is now estopped to assert the contrary. Hence the condition upon which it is claimed the validity of the policy in suit depends, was fully performed before the insured property was destroyed, and the policy was then a valid and binding obligation upon the defendant to the full extent of the plaintiff's loss.

There being but one insurance upon the property, of course there is no question of apportionment of the loss in the case.

By the Court.—Judgment affirmed.

CHURCH VS. SMITH, imp.

LAND CONTRACT. *Rights of vendor: Rights of his assignee of a part or the whole of the purchase-money notes, after a strict foreclosure of the purchaser's equity.*

1. The vendor of land by an ordinary land contract holds the legal title as security for the unpaid purchase money; and on default in its payment is entitled, in this state, to a *strict foreclosure* of the purchaser's equity of redemption.
2. If the vendor transfers to another person the purchaser's notes for the whole of the unpaid purchase money, he will hold the legal title in trust for the security of his assignee; and on failure of the purchaser to pay such notes at maturity, the assignee will be entitled not only to a *strict foreclosure* of the purchaser's equity of redemption, but to a judgment against the vendor enforcing the execution of such trust in some appropriate manner.
3. Whether a mere *vendor's lien* will pass to and be enforceable by an assignee of the purchase-money debt, is not here considered.

Church vs. Smith, impleaded.

4. Where the vendor transfers only *a part* of the purchase-money notes, he will hold the legal title as trustee for his assignee *pro tanto*; and, after a strict foreclosure in his own behalf upon default in payment of the notes by him retained, he will hold the absolute title to an undivided portion of the land as trustee for his assignee, the amount of the assignee's interest in the land being proportioned to his interest in the unpaid purchase money.
5. In an action by the holder of a part of the purchase-money notes in such a case, it is error to adjudge the plaintiff's rights in the land *paramount* to those of the vendor, or to direct a sale of the land and a personal judgment against the vendor for a deficiency: but he should be adjudged to convey to the plaintiff the proper undivided part of the land, or, if he cannot do that, to make compensation therefor on equitable terms; and this relief should be granted where the necessary facts are alleged in the complaint, though the specific relief there demanded is a foreclosure and sale.

APPEAL from the Circuit Court for *Winnebago* County.

The appellant, *Smith*, and one David Kimball, being the owners of a certain tract of land in the county of Winnebago, entered into a contract in writing, in the usual form, with the defendant Bogk, to sell and convey such land to the latter for \$4,000. Bogk paid \$300 in cash, and gave his notes to the vendors, payable to Kimball or bearer, for different amounts and payable at different times, for the residue of the purchase money. Of these notes, the one which first became due (being for fifty dollars and interest) was transferred by the vendors, *Smith* and Kimball, to the plaintiff, immediately after execution. *Smith* and Kimball retained the residue of such notes; and Bogk having failed to pay some of them at maturity, they brought an action against him, in equity, and obtained judgment for a strict foreclosure of his equitable interest in the land, under the contract. The present plaintiff was not a party to that action, and his note has not been paid.

This action was brought upon the theory that the plaintiff has a mortgage interest in the land affected by such contract, as security for his note; and the plaintiff seeks to enforce payment of his note by a sale of the land as upon a foreclo-

Church vs. Smith, impleaded.

sure of an ordinary mortgage. The circuit court adopted the plaintiff's theory of the case, and, after adjudging that the plaintiff's lien upon the land is paramount to that of the vendors, gave judgment of foreclosure, and for a sale of the land, and the payment of the plaintiff's note out of the proceeds of such sale. A personal judgment against *Smith* and the representatives of the estate of Kimball, was also rendered for the amount of such note. From that judgment *Smith* appealed.

Gabe Bouck, for appellant:

1. Upon no theory were the vendors liable upon the note, and the personal judgment against them was therefore erroneous. 2. There is a distinction between a mortgage and a land contract, which the court has failed to observe. *City v. Lamson*, 9 Wall., 484; *Button v. Schroyer*, 5 Wis., 598; *Baker v. Beach*, 15 id., 99; *N. W. Iron Co. v. Meade*, 21 id., 477; *Druse v. Wheeler*, 22 Mich., 439. 3. A vendor's lien is an equitable, not a legal right, and is not assignable. Story's Eq. Jur., § 1219; 4 Kent's Com., 150; *Porter v. Dubuque*, 20 Iowa, 440; *Mackreth v. Symmons*, 1 L. C. in Eq., Am. note; 11 Gratt., 615, 629; *Brush v. Kinsley*, 14 Ohio, 20; *Horton v. Horner*, id., 437; *Tiernan v. Beam*, 2 id., 386; *Jackman v. Hallock*, 1 id., 318; *Baum v. Grigsby*, 21 Cal., 172; *Lewis v. Covillaud*, id., 178; *Williams v. Young*, id., 227; *Ross v. Heinzen*, 36 id., 313; *Keith v. Horner*, 32 Ill., 524; *Richards v. Leaning*, 27 id., 431; 32 id., 526; *Fish v. Howland*, 1 Paige, 20; *White v. Williams*, id., 502; *Dixon v. Dixon*, 1 Md. Ch. Dec., 220; *Hall's Ex'rs v. Click*, 5 Ala., 363; *White v. Stover*, 10 id., 441; *Shall v. Biscoe*, 18 Ark., 142; *Welborn v. Williams*, 9 Ga., 86; *Dickinson v. Chase*, 1 Morris, 492; *Briggs v. Hill*, 6 How. (Miss.), 362; *Walker v. Williams*, 30 Miss., 165; *Pitts v. Parker*, 44 id., 247; *Stratton v. Gold*, 40 id., 778; *Green v. Demoss*, 10 Humph., 371; *Gann v. Chester*, 5 Yerg., 205; *Adams v. Cowherd*, 30 Mo., 458. 4. The vendor could not sell the land

Church vs. Smith, impleaded.

on foreclosure, and an assignee of one of the notes can have no greater rights.

H. B. Jackson, for respondent:

The relation between the parties to a land contract is analogous to that of mortgagor and mortgagee, and, as in case of a mortgage, so here, where several parties hold the several notes, each note holder is a mortgagee, and the holder of the note first falling due has the prior lien. *Wood v. Trask*, 7 Wis., 566; *Marine Bank v. International Bank*, 9 id., 57; *Lyman v. Smith*, 21 id., 674; 14 Ark., 628; 4 S. & M., 294; Meigs (Tenn.), 52; 33 Wis., 658, 666; 2 Story's Eq. Jur., § 1212; 1 id., § 790; 1 N. Y., 595. The contract was executed by both parties, and the note was payable to bearer; hence appellant, by executing the contract, by transferring the note to the plaintiff, and by divesting the vendee of title, came to hold the land subject to the payment of plaintiff's first lien, and a personal judgment against him was proper. *Bishop v. Douglas*, 25 Wis., 696. The judgment contains no provision for enforcing payment except by the sale of the land. 15 Wis., 503. A sale was necessary because the title was not in plaintiff, and his lien could not otherwise be enforced. *Button v. Schroyer*, 5 Wis., 598, therefore, does not apply.

LYON, J. Like the case of *Button v. Schroyer*, 5 Wis., 598, the transaction between *Smith* and *Kimball*, of the one part, and *Bogk*, of the other part, "is an ordinary case of a contract for the sale and conveyance of real estate, part of the purchase money having been paid, * * * and the title withheld as security for the remainder of the purchase money. * * * The relation between the parties is analogous to that of equitable mortgagor and mortgagee. The former has the equity of redemption; the latter has the correlative right of foreclosure."

Bogk having failed to make the payments of purchase money stipulated for in the contract, *Smith* and *Kimball*

Church vs. Smith, impleaded.

availed themselves of such right of foreclosure, and thereby cut off and terminated the equitable interest of Bogk in the land. In accordance with the practice adopted in *Button v. Schroyer*, and followed in *Baker v. Beach*, 15 Wis., 99, this result was accomplished by a strict foreclosure of Bogk's equity of redemption, and not, as seems to be the practice in some of the states, by a sale of the land.

Smith and Kimball held the legal title to the land as security for the payment of all the notes given by Bogk for the unpaid purchase money. This security was essentially a mortgage interest in the land. Had they transferred all of those notes to plaintiff, instead of but one of them, we are clear that they would thereafter have held the legal title to the land in trust for the security of the plaintiff, and that after Bogk had made default by failing to pay his notes at maturity, the plaintiff would have been entitled, not only to a strict foreclosure of Bogk's equity of redemption, but to a judgment against Kimball and *Smith* enforcing the execution of such trust in some appropriate manner. These principles have been asserted and applied in several well considered cases, and we think the decisions rest upon solid grounds. We cite a few of the cases: *Roper v. McCook*, 7 Ala. (N. S.), 318; *Smith v. Robinson*, 13 Ark. (8 Eng.), 533; *Graham v. McCampbell*, Meigs (Tenn.), 52; *Moore v. Anders*, 14 Ark., 628; *Tanner v. Hicks*, 4 Smedes & Mar., 294.

The learned counsel for the appellant maintains that the security held by Kimball and *Smith* is in the nature of a vendor's lien (which he says is not assignable), and hence, that the transfer of the notes of Bogk for the unpaid purchase money cannot operate as an assignment of such security. It must be conceded that there are cases which seem to support the counsel's position. And yet, we think it apparent that there is a fundamental distinction between the lien of a vendor or grantor of land for unpaid purchase money, and the security held by *Smith* and Kimball in the present case. In

Church vs. Smith, impleaded.

the former case, the interest of the grantor in the land is a mere lien, resting, or which may rest, in parol, the fee being in the grantee, who may readily convey the same, discharged of the lien, to a *bona fide* purchaser for value; while in the present case the fee remained in *Smith* and *Kimball*, and *Bogk* took only a mere equity of redemption in the land, no conveyance of which to a stranger could possibly affect thesecurity for the purchase money. In other words, it is the difference between a mere lien without legal title, and ownership of the land subject only to an equity of redemption. This distinction is clearly drawn in some of the cases above cited, and its existence is an answer to the position that *Kimball* and *Smith* held only a vendor's lien for the unpaid purchase money. Hence it is not necessary to determine, and we do not determine, whether a mere vendor's lien will pass to and be enforceable by an assignee of the purchase-money debt.

If *Kimball* and *Smith* would have held the land as trustees for the plaintiff had they transferred to him all of the purchase-money notes, no good reason is perceived why they do not now hold it as such trustees to the extent of his interest in such notes. The transfer of one of several notes secured by a mortgage carries with it to the transferee an interest *pro tanto* in the mortgaged premises; and inasmuch as the security held by *Kimball* and *Smith* was tantamount to a mortgage for the unpaid purchase money, it necessarily follows that when they transferred to the plaintiff a note given for a part of such purchase money, they became his trustees for a corresponding interest in the land, the legal title to which they held as security for the whole debt. Before *Bogk's* equity of redemption was foreclosed, such interest was confined to the legal title; but thereafter the interest so held by *Kimball* and *Smith* as trustees for the plaintiff was and is the absolute title to an undivided portion of the land. The note of plaintiff being for \$50, and the whole unpaid purchase money being \$3,700, the

Church vs. Smith, impleaded.

plaintiff's share of the land is an undivided one seventy-fourth thereof. It is scarcely necessary to say that the rights of the plaintiff are not affected by the foreclosure proceedings to which he was not a party. Yet these proceedings may enure somewhat to his benefit, in that they terminated Bogk's equitable interest in the land in question, and left Kimball, *Smith* and the plaintiff the absolute owners of such land, in common, in the proportions above indicated.

It follows from the views above expressed, that the plaintiff and Kimball and *Smith* are on the same footing in respect to the land. Hence that portion of the judgment which declares that plaintiff's rights therein are paramount to those of Kimball and *Smith*, is erroneous.

The judgment is also erroneous in that it directs the land to be sold. True, we hold that the security with which we are dealing is essentially a mortgage interest, and the statute (R. S., ch. 145, sec. 1) provides that in actions for the foreclosure or satisfaction of mortgages, if the plaintiff recover, the court shall order a sale of the mortgaged premises, or of so much thereof as may be necessary to satisfy the mortgage debt and interest; yet we do not think this security is within the statute. It is quite manifest that the statute has reference to ordinary mortgages, which leave the fee of the mortgaged premises in the mortgagors, only to be divested by the foreclosure sales (*Wood v. Trask*, 7 Wis., 566), and not to a security like that in the present case, which, although analogous to a mortgage, vests or leaves the fee in the mortgagee. In the former case a sale may be deemed necessary to divest the mortgagor of the fee, while in the latter case the mortgagor has produced the same result by his own act or contract, and, having nothing but an equitable interest in the land, he may be divested thereof by a decree or judgment of the court, and a sale is unnecessary. In *Baker v. Beach*, *supra*, the default occurred after the above statute was enacted, and the case was governed by the statute. Although we find there

PIKE vs. Vaughn and others.

no discussion of the subject, the decision is in harmony with the foregoing views.

Besides, this is not properly a foreclosure action. That was the nature of the action of Kimball and *Smith* against Bogk, the judgment in which terminated the equity of redemption of the latter. The real office of this action is to determine the plaintiff's interest in the land, and to secure it to him. It is true the action was not brought on that theory, but the necessary facts are alleged to entitle the plaintiff to that relief, and there seems to be no good reason why he should not obtain it in this action. To that end, a sale of the land is entirely unnecessary.

All that can be required of the appellant and the representatives of Kimball, is, that they execute their trust by conveying to the plaintiff an undivided one seventy-fourth part of the land, or, if it is not in their power to do so, that they make compensation therefor on equitable principles.

It is freely conceded by counsel for the plaintiff that it was error to render a personal judgment in the action. That it was error to render such a judgment, admits of no doubt.

By the Court.—The judgment is reversed, and the cause remanded for further proceedings according to law.

PIKE vs. VAUGHN and others.

SALE: DELIVERY: STATUTE OF FRAUDS. (1) *Title to logs does not pass until measured, unless so agreed.* (2) *Question of delivery. Case stated.* (3) *Parol contract, not executed by delivery, void under statute of frauds, notwithstanding subsequent payments.*

PRACTICE. (4) *Practice on remanding judgment when evidence not before this court.*

1. In general, where the vendor in a contract for the sale and delivery of logs is bound to ascertain the quantity by having the logs scaled, title

Pike vs. Vaughn and others.

does not pass to the vendee until all the logs are delivered and duly measured; but the parties may enter into a valid agreement that the title shall pass as fast as the logs are deposited in the place agreed upon for delivery; and in that case they will be at the vendee's risk from the time of such deposit, even though the vendor may still be bound to have them scaled.

2. Plaintiff agreed to purchase all the logs which one M. could deliver in a certain logging season, and M. got out logs and placed them at or near the point of delivery, which was upon his own land. The contract was silent as to where, when and by whom the logs should be scaled, and it does not appear that they were ever measured in fact. Plaintiff advanced to M., under the contract, goods and supplies to a considerable amount, prior to March 12th, which was the end of the logging season; and afterwards paid him considerable sums on account of the logs prior to the 8th of August. Before that day, the logs still being at the same place, M. sold and delivered a portion of them to V., who on that day took a part of them into his possession, and carried them away as his own. In an action against M. and V. for a conversion of the logs so carried away: *Held*, that the parties to the contract must be presumed to have intended that the logs should be examined by the purchaser, or at least that the quantity should be ascertained, before delivery to plaintiff and acceptance by him; and that there was no complete sale to the plaintiff.
3. The contract, which was by parol, not having been executed by a delivery and acceptance of the logs, was void by the statute of frauds, and subsequent payments did not take it out of the operation of the statute.
4. The question in this case having arisen entirely on the findings of the trial court, and the evidence not being before this court, the judgment for the plaintiff is reversed, and the cause remanded with a suggestion that the circuit court grant a new trial, if satisfied that justice would thereby be promoted, but that otherwise it dismiss the complaint.

APPEAL from the Circuit Court for *Bayfield* County.

The complaint alleged that plaintiff was the owner of and possessed as his own property a large number of pine saw logs lying near the mouth of Onion river, and amounting to about one million feet, and that the defendants, on the 9th of August, 1874, wrongfully took and carried away about two hundred thousand feet of said logs and converted them to their own use. Answer, a general denial. No bill of exceptions was made, and the case came up upon the findings of

Pike vs. Vaughn and others.

the court, which are fully stated in the opinion. The plaintiff had judgment for the value of the logs in question; and defendants appealed.

S. U. Pinney, for appellants:

The action being for the conversion of personal property, plaintiff must have had, at the time of the conversion, a complete property in the logs, either general or special, and the actual possession or the right to immediate possession. The contract was to manufacture out of raw material, and no property passed unless the logs were delivered. 2 Kent, 676; *Mucklow v. Mangles*, 1 Taunt., 318. Had the logs been delivered by *McDonald* to the plaintiff, with the intention of vesting the title and right of possession in plaintiff, and had they been accepted by him with the intention of taking possession as owner, the title would have vested in him without measurement. *Sewell v. Eaton*, 6 Wis., 490; *Morrow v. Reed*, 30 id., 81. But the logs here were not delivered, but remained on the premises of *McDonald*, and not even words had passed between the latter and the plaintiff as to the possession. The possession was, therefore, still in *McDonald*. *Menzies v. Dodd*, 19 Wis., 349. The logs had to be measured by the parties to ascertain the price; hence a present right of property did not pass to the plaintiff. 2 Kent, 663, 664; *Morrow v. Reed*, *supra*. The contract provided no time for payment or delivery; hence payment was a condition precedent to delivery. 2 Kent, 659. The place of delivery was specified, but not the time. Neither did the contract provide that placing the logs at the place of delivery mentioned should be a delivery to plaintiff, or should vest the title in him. Trover can not be maintained for goods contracted to be sold, before their identity, quantity and price are ascertained, or while anything remains to be done by the seller. 3 Phill. Ev. (5th Am. ed.), 447. Again, the contract was void by the statute of frauds. Tay. Stats., 1256. The fact that the logs were not procured or provided, or fit for delivery, does not take the case out of the

Pike vs. Vaughn and others.

statute. *Hardell v. McClure*, 2 Pin. Wis., 289; 1 Ohand., 271; *Mason v. The Whitbeck Co.*, 85 Wis., 164. Some part of the purchase money must be paid at the making of the contract, or the contract itself must be reaffirmed at the time payment is made.

The cause was submitted for the respondent on the brief of *Henry N. Setzer*, who argued that the facts found by the court constituted an absolute delivery, so as to pass the title to the logs to the plaintiff. *Bates v. Conkling*, 10 Wend., 390. The payment of nearly the entire amount due was an acceptance of the logs by the plaintiff. *Lansing v. Turner*, 2 Johns., 13; *Oliphant v. Baker*, 5 Denio, 379. Admitting, for the argument, that the logs were not measured until after the taking, the property in them would nevertheless pass to plaintiff at the time they were placed at the place agreed upon; for the contract included all the logs *McDonald* should get out during the winter; hence the scaling of the logs was not necessary for their identification. It is well settled that, where goods are identified, though it may be necessary to measure them in order to ascertain what would be the price of the whole at the rate agreed upon, the title will pass immediately to the purchaser. *Crofoot v. Bennett*, 2 Coms., 260. In this case *McDonald* himself identified every log by placing it at the point agreed upon. 2. The contract was not void. It was not for the sale of any chattel or personal property, but was merely executory. *McDonald* agreed to cut and haul logs during the winter; to "get out and furnish" logs. After getting out 500,000 feet, and notifying respondent, he informed him that he could "get out" and deliver a larger quantity, and the agreement is thereupon extended to cover all the logs cut and hauled by *McDonald*. It was not a contract to sell those logs, but an agreement by *McDonald* to perform work and labor in getting out and placing at a certain place the logs in dispute, which, at that time, had no existence in fact. This being so, and the contract providing that the

Pike vs. Vaughn and others.

work and labor were to be performed within the year, the statute of frauds does not apply.

COLL, J. The questions in this case arise entirely upon the finding of the court below, there being no bill of exceptions. Upon the facts found, it seems impossible to hold that there was such a delivery and acceptance of the logs in controversy as would pass the title or ownership to the plaintiff. In order to sustain the action it must appear that there was a perfect and complete sale, so that the right of property in the logs and the risk of loss were transferred to the purchaser. It is hardly necessary to remark that an actual or constructive delivery was essential to a complete sale. The court found, in substance, that the plaintiff, in the fall of 1873, entered into a verbal contract with the defendant *John McDonald*, whereby it was agreed that *McDonald* should get out and furnish for him logs during the following winter or logging season, and deliver them at the lake shore, at the mouth of Onion river, near Bayfield; and that the plaintiff was to pay for the logs at the rate of \$4.50 per 1000 feet. It was mutually understood at the time that *McDonald* could and would furnish and deliver on the contract a half million feet of logs; and, while he should be engaged in getting out the logs, the plaintiff agreed to let him have such goods and provisions as he might need, upon the credit of or in part payment for the logs. In the performance of the contract, *McDonald* got out logs estimated by him to amount to the stipulated quantity, and placed them at or near the place of delivery, and notified the plaintiff thereof; and at the same time informed the plaintiff that he could get out and furnish at the place of delivery a considerably larger quantity during the winter; whereupon it was agreed between the parties that the previous parol contract should extend to and apply to all the logs which *McDonald* could furnish and deliver during the season. Accordingly, during the remainder of the logging season, which lasted until

Pike vs. Vaughn and others.

the 12th of March, 1874, *McDonald* went on and got out more logs, placing them at or near the point of delivery, which was upon land that he was in possession of as owner. The court found that the contract was silent as to when, where or by whom the logs should be scaled for the purpose of ascertaining the quantity furnished by *McDonald*; and it does not appear that any measurement has ever been effected. The court, however, found that there were at least 721,347 feet, and that some out of the whole lot, not included in this amount, were washed from the beach into the lake, and lost. The plaintiff advanced to *McDonald*, prior to the 12th of March, 1874, under the contract, goods, provisions and supplies to an amount of \$1,300 or \$1,400, and afterwards paid him, on account of the logs, in money and goods from time to time prior to the 9th day of August, 1874, the further sum of \$1,700 and over. Prior to the 8th of August, 1874, the logs still being at the place where *McDonald* had left them, *McDonald* sold and delivered a portion of them to his codefendant, *Vaughn*, 160,000 feet of which *Vaughn* took on that day into his own possession and carried away, claiming the same as his own property. And the action is to recover for the conversion of this portion of the logs thus carried away.

These are the material facts stated in the finding, bearing upon the question of a sale and delivery of the property. And the question is, Do they show a complete and perfect sale, and do they warrant the conclusion of the court below that the logs became and were the property of the plaintiff as soon and as fast as they were placed by *McDonald* at the place of delivery designated in the contract? It seems to us the facts do not give rise to any such conclusion or presumption of law. It was doubtless competent for the parties to agree that placing the logs at the point designated in the contract should be a delivery, so that the right of property and the risk of loss should pass to the plaintiff. Then, as the logs were deposited at the proper place by the vendor, they would at once become

Pike vs. Vaughn and others.

subject to the power and control of the purchaser, who might deal with them as he saw fit. Nor would the fact that the logs had not been scaled make any difference or prevent the sale from being complete, where it appeared from the contract that the parties intended that the title should pass as soon as they were placed or delivered at the proper place. *Morrow v. Reed*, 30 Wis., 81; *Morrow v. Campbell*, id., 90; and *Sewell v. Eaton*, 6 id., 490. "Although, ordinarily, so long as anything remains to be done by the seller, the goods are at his risk, yet this general rule may be overcome by the special facts of the case; and if it clearly appears to have been the intention of the parties that the property should be deemed to be delivered, and the title to have been passed, and especially if their acts be inconsistent with any other view, the mere fact that something remains to be done will not govern such intention." Story on Sales, § 298 a. But this rule has no application to the case at bar. For the court does not find that the parties agreed that as fast as the logs were deposited at the place designated, the title should vest in the plaintiff, and that the property should be at his risk. And the facts found do not justify the inference that this was the contract. On the contrary, the facts fairly give rise to the presumption that the contract came within the application of the usual rules governing such agreements, and that the parties did not intend there should be a delivery and the title pass until the logs were inspected by the plaintiff and the quantity ascertained by the proper measurement. We do not suppose the plaintiff was bound to accept all the logs which *McDonald* might deposit at the point designated, if any were unfit for use. The fair presumption is, that the parties intended the logs should be examined, or at least that they should be scaled and the quantity ascertained, and that until this was done there should be no delivery and acceptance of the property. In this case the goods were bulky and incapable of manual delivery; but there could be a constructive delivery which would operate as

Pike vs. Vaughn and others.

a direct transfer of the ownership and right of property; and this was essential to a complete and perfect sale. And where there was a transfer of the right of property, there would necessarily be a transfer of the risk of loss, so that, if the logs were washed away or otherwise destroyed, the loss would be the loss of the purchaser. But we do not think the transaction in this case amounted to a complete sale, or was attended with any such legal consequences.

We have thus far considered the question whether the facts found showed a complete and perfect sale, assuming that the parol contract was valid. But it is obvious, unless the contract was fully executed by a delivery and acceptance of the logs, it would be within the statute of frauds. The subsequent payments would not have the effect to take the contract out of the operation of the statute, within the doctrine of *Bates v. Chesebro*, 32 Wis., 594; *Same Case*, 36 id., 636.

As the evidence in the case is not before us, we are reluctant to make a peremptory order in regard to the entry of judgment. We have therefore concluded to reverse the judgment, and send the case back with an intimation that the circuit court should grant a new trial if satisfied that the rights of the parties and the cause of justice will thereby be promoted; otherwise, to dismiss the complaint. This was the course pursued in the case of *Laro v. Grant*, 37 Wis., 548-568; and we think it best to remit this case with a similar suggestion.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

Marsh vs. Pugh.

MARSH VS. PUGH.

EVIDENCE. *Contract to build house according to written specifications; oral proof of plan referred to in specifications.*

In an action for an alleged balance due plaintiff for erecting for defendant certain houses of uniform size and plan, where the only question was, whether, by the contract between the parties, the roofs were to have a one-fourth or a one-third pitch, plaintiff put in evidence the written *specifications* for the houses, which did not specify the pitch of the roofs, but referred to a *plan*, distinct from the specifications. *Held,*

(1) That testimony was admissible for the plaintiff to show that such plan corresponded with a certain drawing which had been lost, and also to show at what pitch the roofs were represented on such drawing.

(2) That defendant was then entitled to show by parol that the plan agreed upon corresponded with that of certain other houses, and what was the pitch of *their* roofs.

APPEAL from the County Court of *Milwaukee* County.

The plaintiff, a builder, erected for the defendant six small houses or cottages, of uniform size and plan, at a stipulated price; and he brought this action to recover an alleged unpaid balance of the contract price, and for certain work performed thereon and materials furnished therefor not required by the contract. A charge in the plaintiff's account for changing the pitch of the roofs seems to be the only item therein seriously contested. The plaintiff claimed that the original contract was for roofs having one-fourth pitch, while the defendant claimed that the agreed pitch was one-third. The roofs were constructed with the latter pitch, which was the more expensive of the two; and the plaintiff recovered the difference in expense. From this judgment the defendant appealed.

The evidence and the rulings of the trial court are sufficiently stated in the opinion.

The cause was submitted on briefs.

McMullen & Houts, for appellant.

B. N. Austin, for respondent.

Marsh vs. Pugh.

LYON, J. On the trial, the plaintiff gave in evidence an instrument in writing, signed by the parties, purporting on its face to be *specifications* for the houses in question. This instrument does not specify the form or pitch of the roofs. In it, however, we find reference made to a *plan* of the houses, which is evidently separate and distinct from the *specifications*.

The plaintiff testified, in substance, that such *plan* was drawn on a board which had been lost, and that the drawing showed the roofs at a quarter pitch. But the court refused to allow the defendant to show that the agreement between the parties was that the houses should be constructed like three specified cottages in the neighborhood, and that the roofs of those cottages were constructed with a pitch of one-third.

Manifestly, it was error to reject testimony to prove those propositions. It was competent for either party to show what was the *plan* referred to in the specifications, and the court very properly allowed the plaintiff to give testimony tending to show that such plan corresponded with a drawing of the houses, and, such drawing having been lost, to show by parol at what pitch the roofs were represented thereon. But it was equally competent for the defendant to introduce testimony tending to show that the plan agreed upon corresponded with that of the three cottages above mentioned, and what was the pitch of the roofs of those cottages. It cannot justly be said that such testimony will tend to change, or add to, the terms of a written contract. The form of the roof pertains to the *plan* of the buildings, and parol testimony concerning it does not affect the written specifications.

Because of the error above mentioned, the judgment must be reversed, and a new trial awarded.

By the Court.—So ordered.

Motion to admit Ole Mosness, Esq., to the Bar of this Court.

In the Matter of the Motion to Admit OLE MOSNESS, Esq.,
to the Bar of this Court.

Nonresident attorneys not admissible to the bar of a court of this state.

Under ordinary circumstances, members of the bar of other states are permitted to argue causes in this court, without any general license to practice here.

2. Members of the bar are officers of the court, and in some sense officers of the state for which the court acts.
3. Officers charged with the general business of the state, within the state, must be residents of the state; and for all functions within the jurisdiction of the courts, officers of those courts must be residents of the state.
4. If ch. 50 of 1855 (Tay. Stats., 1344-5, §§ 39, 40) was intended to do more than authorize the appearance here of members of the bar of other states as counsel in the trial and argument of causes, it was without the power of the legislature.

On the 11th of April, 1876, W. F. Vilas, Esq., moved the court for the admission of Ole Mosness, Esq., to the bar of this court, as an attorney and counselor thereof. It appeared from Mr. Mosness' written application that he had been admitted to practice at the bar of the supreme court of the state of Illinois; and his application was supported, as the statute requires, by "an affidavit of good moral character, and that he is a resident of said state of Illinois." The court took the matter under advisement, and on the 27th of April denied the motion upon grounds stated in the following opinion.*

* Ch. 50, Laws of 1855 (Tay. Stats., 1344-5, §§ 39, 40), provided as follows:
"Sec. 1. Any person who has been duly admitted and licensed to practice as an attorney and counselor-at-law in the supreme court of the state of Illinois, and all other states in the union where counsel of this state are admitted as counsel of such state on the same terms hereinafter prescribed, shall be admitted and licensed to practice as an attorney and counselor-at-law in all the courts of this state, upon written application signed by such person, and upon presenting to such court proof that he has been so admitted to practice in the supreme court of Illinois and all other states in the union where counsel

Motion to admit Ole Morness, Esq., to the Bar of this Court.

RYAN, C. J. It is, we believe, the general practice of courts of record in the several states, to permit gentlemen of the bar in other states to appear as counsel on the trial or argument of causes. Such has been the uniform practice of this court. And, under all ordinary circumstances, it will always be a pleasure to us to permit members of the bar of other states to argue causes here, whenever they may appear here to do so. No license to practice here is necessary or proper for that purpose; the usual and proper practice being to grant leave *ex gratia*, for the occasion.

But general license to practice here as attorney and counselor rests upon quite different considerations. The bar is no unimportant part of the court; and its members are officers of the court. *Thomas v. Steele*, 22 Wis., 207; *Cothren v. Connaughton*, 24 Wis., 134. See Bacon's Abr., Attorney H.; 1 Tidd's Pr., 60; 3 Black., 25; 1 Kent, 306; *Ex parte Garland*, 4 Wall., 333. And if officers of the court, certainly, in some sense, officers of the state for which the court acts. *Re Wood*, Hopk., 6. This is not really denied in 20 Johns., 492, decided in the same year. And if it were, we have no doubt that the chancellor was correct; and that attorneys and counselors of a court, though not properly *public* officers, are *quasi* officers of the state whose justice is administered by the court.

of this state are admitted as counsel of such state on the same terms herein-after prescribed, and an affidavit of good moral character, and that he is a resident of said state of Illinois. Sec. 2. It shall be the duty of any court of this state, upon application and proof aforesaid, to admit any attorney of the state of Illinois, and all other states of the union where counsel of this state are admitted as counsel of such state on the same terms hereafter prescribed, to practice, and to take and subscribe the usual oaths required by the laws of this state in relation to attorneys-at-law in this state, and to issue a license as in other cases of admission of attorneys-at-law; and the clerk of such court to enroll the same on his roll of attorneys, as in other cases; and such attorney, so making the application as aforesaid, shall, upon receiving such license, be entitled to all the privileges of attorneys-at-law resident in this state."

Motion to admit Ole Momes, Esq., to the Bar of this Court.

The state may have extra-territorial officers, as commissioners to take acknowledgments, etc. But these are exceptions; and the general business of the state, within the state, executive, legislative and judicial, must be performed by citizens or denizens of the state; and the officers charged with it must be resident in the state. *State v. Smith*, 14 Wis., 497; *State v. Murray*, 28 id., 96.

So the courts may have extra-territorial officers, for extra-territorial functions, as commissioners to take depositions, etc. But for all functions within the jurisdiction of the courts, their officers must be residents of the state. This is essential to the nature of the functions themselves, and to the proper control of courts over their officers.

The office of attorney and counselor of the courts is one of great official trust and responsibility in the administration of justice; one liable to great abuse; and has always been exercised, in all courts proceeding according to the course of the common law, subject to strict oversight and summary power of the court. It would be an anomaly, dangerous to the safe administration of justice, that the office should be filled by persons residing beyond the jurisdiction of the court, and practically not subject to its authority. We take it, that members of the bar of this state lose their right to practice here by removing from the state. After they become non-residents, they can appear in courts of this state *ex gratia* only. Our courts cannot have a nonresident bar.

This all appears to us to be so very plain, that it is difficult to believe that ch. 50 of 1855 was intended to do more than to authorize the appearance here, as counsel in the trial and argument of causes, of gentlemen of the bar of other states. If intended to do that, it was probably unnecessary. If intended to do more, it was clearly without the power of the legislature.

For the reason only that the gentleman whose admission is moved is not a resident of the state, the motion must be denied.

Smith vs. Wait, impleaded.

SMITH vs. WAIT, imp.

FORECLOSURE OF MORTGAGE. *Adjustment of equities; holder of second mortgage not including homestead, cannot have that first sold under prior mortgage.*

COSTS ON APPEAL.

1. Since ch. 133 of 1870, on foreclosure of a mortgage covering the mortgagor's homestead, a subsequent mortgagee of the same lands without the homestead, cannot insist that such homestead be first sold to pay the mortgage in suit, although his lien was acquired prior to the passage of said act.
2. On appeal by the mortgagor from a judgment which provides for a sale of the homestead first, this court has no discretion, on reversing such judgment, to award costs against the subsequent mortgagee defendant, instead of against the plaintiff, although such provision was inserted in the judgment against the will of the latter, and on motion of such subsequent mortgagee.

APPEAL from the Circuit Court for *Outagamie* County.

Foreclosure. The mortgage in suit was given to plaintiff by defendant *Wait* and her husband, since deceased, in January, 1867, and covered four lots in the city of Appleton, one of which, described as lot 7, is claimed by the mortgagor as a homestead. The defendant *Lightbody*, who held a second mortgage, executed in March, 1869, upon the same lands except lot 7, appeared and answered, setting out the existence of his mortgage, the amount due thereon, and that lot 7 was amply sufficient, if sold, to pay the first mortgage and the costs, while the other lots were no more than sufficient to pay his own; and asking that lot 7 be first sold to satisfy the mortgage in suit.

Judgment was entered in accordance with the prayer of said answer, from which the defendant *Wait* appealed.

The cause was submitted for the appellant on the brief of *Warner, Ryan & Allen*, who argued that although, before the act of 1870, it rested in the sound discretion of the court to allow the homestead, in such a case as this, to be first sold

Smith vs. Wait, impleaded.

(*White v. Polleys*, 20 Wis., 503; *Jones v. Dow*, 18 id., 241), that act has changed this rule, and applies as well to mortgages existing at the time of its passage as to those made subsequently. *Hanson v. Edgar*, 34 Wis., 653. The law affects the remedy, merely, and is not, therefore, unconstitutional. 9 Wis., 559; 10 id., 125; 16 id., 296; 18 id., 437; 24 id., 196; id., 664; 31 id., 257; 32 id., 496.

Geo. H. Myers, for respondent *Smith*, argued that the rule enforced in *White v. Polleys*, 20 Wis., 505, and *Jones v. Dow*, 18 id., 241, was only a rule of chancery discretion, and not an absolute rule of law; that the legislature can control the discretion of the courts when only the remedy is affected (*Andrews v. Farmers' L. & T. Co.*, 22 Wis., 288; *Balt. & Susq. R. R. Co. v. Nesbit*, 10 How., 395, and the cases cited *supra*); and that, as the direction to sell the homestead was inserted on the application of *Lightbody*, and against the wishes of the plaintiff, the costs of reversal should be placed upon the former. 1 Story's Eq. Jur., §§ 642-5; *Dorr v. Shaw*, 4 Johns. Ch., 17; *Ex parte Kendall*, 17 Ves., 520; *Newsom v. McLendon*, 6 Ga., 392.

H. Pierce, for respondent *Lightbody*:

The parties contracted with reference to the law as it existed at the time of the execution of the mortgages, and that law, as expounded by this court in *White v. Polleys*, 20 Wis., 503, and *Jones v. Dow*, 18 id., 241, must control as to their respective rights. 5 Wis., 605; 3 Wall., 294; 1 id., 175; 16 How. (U. S.), 432. The law of 1870, if applied to mortgages executed prior to its passage, would destroy vested rights, and would therefore be unconstitutional. Const., art. I., sec. 12; *Von Baumbach v. Bade*, 9 Wis., 560. Unless a different intention is clearly manifested, statutes should be construed as relating to future and not to past transactions. *State v. Atwood*, 11 Wis., 423; *Austin v. Burgess*, 36 id., 186; *Seamans v. Carter*, 15 id., 548; *Simmons v. Johnson*, 14 id., 523; *Finnery v. Ackerman*, 21 id., 269.

Smith vs. Wait, impleaded.

COLE, J. The decision in *Hanson v. Edgar*, 34 Wis., 653, controls this case, unless the fact that the *Lightbody* mortgage was executed before the passage of ch. 133, Laws of 1870, calls for the application of a different rule. But we do not think that fact can or should have any such effect, for this reason: The rule that where one has a lien upon two estates, and another a subsequent lien upon only one of them, the former will be compelled first to exhaust the subject of his exclusive lien before he resorts to the doubly-charged estate, was one which a court of equity enforced upon equitable principles. It was not a matter of strict right given by the contract, nor was it in any sense a vested right, but was an equitable rule, enforced in cases where no injustice was done by its application and other equities did not intervene. *Kendall, Ex parte*, 17 Ves., 514; *Dorr v. Shaw*, 4 Johns. Ch., 17; 1 Story's Eq. Jur., § 642; *Newsom v. McLendon*, 6 Ga., 392; *Adams' Eq.*, p. 507 et seq. In other words, the right rested in the sound judicial discretion of the chancellor, and was not an absolute rule of law. The law of 1870 has certainly changed this equitable doctrine in respect to homesteads, so far as mortgages are concerned executed after its passage. And in deference to the policy of that statute, it is the duty of a court of equity to favor the homestead right as against the equities of creditors arising under the former rule. In the present case the circuit court ordered the homestead to be first sold to satisfy the plaintiff's mortgage, in order to benefit *Lightbody*, who has taken an imperfect security. This we think was error, and must work a reversal of the judgment.

The judgment recites that the direction to sell the homestead first was given by the court on the motion of *Lightbody*; and the plaintiff's counsel states that this order was made against the wishes of his client. The counsel therefore claims that the costs on the reversal of the judgment should be adjudged against *Lightbody*, and not against the respondent. Under the statute we can exercise no such discretion in respect

 Northrup vs. Trask.

to awarding costs in this court. The law gives them to the prevailing party; and according to the record the plaintiff is the losing party on this appeal.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for the entry of the proper judgment of foreclosure.

 NORTHROP VS. TRASK.

PERSONAL PROPERTY: RIGHT OF ACTION. (1) *Presumption that dwelling forms part of realty.* (2) *House being removed becomes personality while in transitu.* (3) *One who has no possession not guilty of conversion.* (4) *When vendor in land contract can not maintain trover or replevin for house.* (5) *Vendor's remedy by proceeding to stay waste.*

1. In an action for the conversion of a dwelling house removed from the lot on which it was built to other land, the presumption is that it had been attached to the former lot and became attached to the latter, so as to form in each case part of the realty.
2. The person who removed the house, not having been a mere trespasser, but the equitable owner of the house and of the lot on which it was built, the house, while *in transitu* between the two lots, was personality, the subject of conversion. *Huebschmann v. McHenry*, 29 Wis., 655, distinguished.
3. It seems that one who had no possession, real or constructive, of the house while *in transitu*, but merely permitted it to be attached to his soil by the person who removed it, could not be held guilty of a conversion of the house.
4. If one who is rightfully in possession of land under a contract of sale, after default in payment but before any foreclosure of his equity, dispose of a house attached to such land (as by removing it to other land), the vendor in the land contract, having no possessory title to the house, cannot maintain replevin or trover therefor.
5. If the purchaser in a land contract, before payment of the price, has no right as against the vendor to remove a building thereon, and so diminish the value of the security (as intimated in *Seatoff v. Anderson*, 28 Wis., 212), still the vendor's remedy in such a case is not by action for damages, but by proceeding to stay waste. *Fairbank v. Cudworth*, 33 Wis., 353.

Northrup vs. Trask.

APPEAL from the Circuit Court for *Winnebago County*.

Action for the value of a house alleged to have been converted by defendant. It appeared in evidence that the plaintiff sold a lot to one Lee on credit, giving him an ordinary land contract, Lee covenanting to erect a house of a given value upon the lot within a specified time. Lee built the house, but failed to make his payments as agreed, and afterwards, before the commencement of this action, moved the house to defendant's lot. Defendant had furnished Lee lumber for the house, for which he had not been paid, and told Lee, before the removal, that the latter might move the house upon his (defendant's) lot, and when his claim for the lumber was paid, he would sell Lee the lot at a certain price, or the latter could then remove the house. After the removal, plaintiff, with one Edwards, called upon defendant, and Edwards testifies that the following conversation then occurred: "*Mr. Trask* stated that the house was on his land. Plaintiff asked him what right he had to move the house off. He said he had a greater interest in the house than plaintiff had, and that he had a right to move it off. He further stated that all he wanted was his pay, and that he should insist on. Plaintiff asked defendant if he would draw the house back, or permit him to draw it back. Defendant said he would not, unless he was paid his debt." As a witness in his own behalf, defendant testified: "I had nothing to do with removing the house or authorizing it to be done. I have not been in possession, nor ever had any control of the house. Lee has always been in possession of it." As to the interview between himself and the plaintiff, defendant testified that he "refused to remove the house back, or consent to his (plaintiff's) removing it."

The court found that plaintiff was the owner of the house, but that defendant had not converted it, and gave judgment for defendant, dismissing the complaint. Plaintiff appealed.

David Taylor, for appellant:

"A conversion," according to the legal definition, "consists

Northrup vs. Traak.

either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own." 2 Greenl. Ev., § 642; *Smith v. Schulenberg*, 34 Wis., 49. See also *Bristol v. Burt*, 7 Johns., 254; *Huebschmann v. McHenry*, 29 Wis., 655. Tested by this definition, the house was certainly converted by defendant. When placed on defendant's lot, under the agreement with Lee, the house was clearly there for the benefit of defendant, to the extent of his claim. The lot remained defendant's, and if the house did not become so attached thereto as to form part of the realty, it was at least delivered to defendant in pledge or by way of equitable mortgage, so that it could not be removed by Lee without defendant's consent, unless Lee first paid the claim for the lumber. *Macomber v. Parker*, 14 Pick., 497; *Parks v. Hall*, 2 id., 211; *Gordon v. Ins. Co.*, id., 259; *Brown v. Bement*, 8 Johns., 96; *Shepardson v. Green*, 21 Wis., 539; *Mowry v. Wood*, 12 id., 413. Even if this were not so, it would be enough that defendant claimed a right to hold the property as against plaintiff, and refused to permit the plaintiff to remove it.

Gabe Bouck, for respondent:

To sustain trover, the plaintiff should have shown an actual or virtual possession of the property in defendant, and that it was subject to his control. *Bowman v. Eaton*, 24 Barb., 528; *Hunt v. Kane*, 40 id., 638; *Robinson v. Hartredge*, 13 Fla., 501; *Traylor v. Horrall*, 4 Blackf., 317; *Hill v. Covell*, 1 Coms., 522; *Canot v. Hughes*, 2 Bing. N. C., 448; *Dietus v. Fuss*, 8 Md., 148; *Ragsdale v. Williams*, 8 Ired., 498; *Yale v. Saunders*, 16 Vt., 243; 2 Hilliard on Torts, ch. XXV, § 13. If it was not in defendant's power to give up the house when demanded, he is not liable in trover, even if he claimed ownership or forbade plaintiff to move it back. "A person who has no possession, actual or constructive, of property demanded of

Northrup vs. Trask.

him by the owner, nor has previously wrongfully possessed or withheld it, can not be made liable in an action of trover, for refusal to deliver up, although he may have withstood the efforts of the owner to obtain possession, or prevented him by force." *Boobier v. Boobier*, 39 Me., 407. See also 2 Greenl. Ev., § 644; 2 Starkie's Ev., 1497; *Vincent v. Cornell*, 13 Pick., 294; *Nixon v. Jenkins*, 2 H. Bl., 135; *Edwards v. Hooper*, 11 M. & W., 366; *Smith v. Young*, 1 Campb., 441; *Anon.*, 2 Salk., 655; *Ross v. Johnson*, 5 Burr., 2825; *Severin v. Keppell*, 4 Esp., 157; *Dewell v. Moxon*, 1 Taunt., 391; *Kinder v. Shaw*, 2 Mass., 398; *Chamberlin v. Shaw*, 18 Pick., 278; *Leonard v. Tidd*, 3 Met., 6; *Jones v. Fort*, 9 B. & C., 764; *Kelsey v. Griswold*, 6 Barb., 436.

RYAN, C. J. It does not positively appear in this case whether the house, which is the subject of this action, was attached to the soil either on the lot on which it was built or on the lot to which it was removed. The presumption is that it was so attached in both instances, so as to form part of the realty. *In transitu* between the two lots, it was personalty, the subject of conversion. *Huebschmann v. McHenry*, 29 Wis., 655.

That case, it is true, holds the building there to have remained personal property on the lot to which it had been removed. But that is on the sole ground that the defendant, who removed it from the plaintiff's land to his own, was a mere trespasser, and could not therefore divest the plaintiff's title by attaching the building to his own soil. For reasons presently appearing, that distinction does not apply to this case.

It is difficult to understand how the respondent here could be held guilty of conversion of the house, as personal property, when it appears that he had no possession, real or constructive, of the house while *in transitu*. His only possession, if possession it be, arises from the attachment of the house to

Northrup vs. Trask.

his soil, as part of his realty, by Lee, the equitable owner of the house. This the respondent suffered Lee to do, but had otherwise no part in the removal.

It is more difficult still to understand the right of the appellant to maintain the action. He had made a subsisting contract with Lee for the sale of the lot on which Lee built the house, and of which Lee was in possession under the contract, when he removed the house. It is true that Lee had failed in making payments required by the contract. But the appellant had not foreclosed the contract, and his title in the lot was that of mortgagee in fee; the equitable estate, possession and right of possession being in Lee as owner of the house and lot. *Button v. Schroyer*, 5 Wis., 598; *Baker v. Beach*, 15 id., 99; *Landon v. Burke*, 36 id., 378. Subject to the right of the appellant as mortgagee, Lee had therefore perfect right to dispose of the house; and the appellant had no possessory title to it on which he could maintain this action. If the house had been removed by a stranger, a trespasser, as in *Huebschmann v. McHenry*, the right of action, replevin or trover, would have been in the respondent, not in the appellant. It is true that COLE, J., remarks, *arguendo*, in *Seatoff v. Anderson*, 28 Wis., 212, that the purchaser, under such a contract and in such circumstances, would have no right as against his vendor, to remove the building and diminish the value of the security. But, conceding that, it is apparent that in such a case the remedy of the vendor is not by action for damages, but by proceeding to stay waste. *Fairbank v. Cudworth*, 33 Wis., 358.

By the Court.—The judgment of the court below is affirmed.

Reeve and another vs. The Liverpool, London & Globe Ins. Co. and another.

REEVE and another vs. THE LIVERPOOL, LONDON & GLOBE
INSURANCE COMPANY and another.

BURDEN OF PROOF. *Onus on defendant in action by indorsee of commercial paper taken in regular course of business, to show not only fraud but that plaintiff is chargeable with notice of it.*

When an indorsee of commercial paper, in an action by him thereon, has shown that he took it in the *usual course of business* (as by showing that he was a banker at the place where the payee resided, and purchased the paper at its face, on the day after its date), the burden is then upon the defendant to show, not only that the paper was obtained by the payee's fraud, but that the circumstances were such as to charge the plaintiff with notice of the fraud, or at least put him upon inquiry.

APPEAL from the Circuit Court for *Winnebago* County.

Action upon a bill of exchange drawn upon the defendant company by its general agent, in payment of a loss under one of its policies issued to the payee. Defense, that the bill was obtained by fraud on the part of the latter. The facts are stated in the opinion.

By direction of the court, the jury found for the plaintiffs; and from a judgment on the verdict, the defendant company appealed.

The cause was submitted on briefs.

Jackson & Halsey, for appellant, to the point that payment of value did not relieve the plaintiff from the necessity of showing *bona fides*, and that the burden of proof on the latter question was upon him and not upon the defendant, cited 2 Greenl. Ev., § 172; 1 id., § 79; Edwards on Bills, 688, 691; *First National Bank v. Green*, 43 N. Y., 298; *Munroe v. Cooper*, 5 Pick., 412; *Bailey v. Bidwell*, 13 M. & W., 76; *Grant v. Vaughan*, 3 Burr., 15, 16; *McKesson v. Stanberry*, 3 Ohio St., 156; 9 Barn. & Cress., 208; 31 Iowa, 342; *Kinney v. Kruse*, 28 Wis., 183; *Smith v. Braine*, 3 Eng. L. & E., 379; *Harvey v. Towers*, 4 id., 531; *Small v. Smith*, 1

Reeve and another vs. The Liverpool, London & Globe Ins. Co. and another.

Denio, 583; *Wardell v. Howell*, 9 Wend., 170; *Vallett v. Parker*, 6 id., 615; *Skilding v. Warren*, 15 Johns., 270; 45 Mo., 249; 39 id., 372. They also contended that payment of value was at most mere evidence of good faith, to be weighed by the jury against the presumption of bad faith attaching to the holders of the draft on account of the fraud in obtaining it; and that the court should therefore have received the offered evidence of the fraud, and submitted the question of plaintiff's good faith to the jury.

Geo. W. Burnell, for respondent, contended that proof of the payment of full value for the bill before maturity was *prima facie* proof of good faith; and as plaintiff had proved that in the first instance, the burden was then upon defendant to show notice of the fraud. Edwards on Bills, 686-7, 321, note 9; 1 Parsons on B. & N., 188, note (h); 47 N. Y., 143; 35 id., 65; 54 id., 288; 5 Barn. & Ad., 909; 10 A. & E., 684; Smith's L. C., 610, 264; *Hall v. Featherstone*, 3 Hurl. & N., 284; *Fitch v. Jones*, 32 Eng. L. & E., 134; *Catlin v. Hansen*, 1 Duer, 309; *Hart v. Potter*, 4 id., 458; *Ross v. Bedell*, 5 id., 462; *Corby v. Butler*, 55 Mo., 398; *Horton v. Bayne*, 52 id., 531; *Goodman v. Simons*, 20 How., 343; 14 Wis., 461; 11 id., 353; 16 Pet., 1; 2 Wall., 110, 121; 22 How., 96; 37 Pa. St., 366; 54 N. Y., 288; 56 id., 137.

COLE, J. This case presents a question of some practical importance as to the burden of proof. The action is upon a bill of exchange, drawn by its agent on the defendant company to pay a loss on one of its policies, and indorsed by the insured, the payee, to the plaintiffs. The company answered, stating facts which showed that the bill was obtained through fraud on the part of the payee, and alleging that the plaintiffs knew, or had good and sufficient reason to know, the facts and circumstances connected with the obtaining of the bill. The plaintiffs proved, as a part of their case, that they purchased the bill the day after its date, from the payee, and paid the full

Reeve and another vs. The Liverpool, London & Globe Ins. Co. and another.

face thereof; and that they had been the owners of the same ever since. Then, after showing that the bill had been duly protested for nonpayment, the plaintiffs rested. Thereupon the company called a witness and offered competent evidence to prove the facts set up in its answer, showing that the payee fraudulently obtained the bill; but at the time such evidence was offered, the counsel for the company stated that the above was all it was intended to prove by the witness. The evidence was objected to, and excluded, for the reason that the company had not shown that the plaintiffs had any knowledge of the fraud, and because no foundation had been laid for the evidence by showing that the plaintiffs had notice of such facts and circumstances as should put them upon inquiry before the purchase of the bill.

Considering the very intelligent judge before whom the case was tried, and the able counsel on both sides engaged in the cause, it is unreasonable to assume that the proposed evidence was objected to and excluded for the reason or upon the ground that, before the company should be allowed to prove the existence of the fraud, it must *first* show that the plaintiffs knew of it or had notice of circumstances which should have put them upon inquiry. Had the counsel for the company stated, when he made the offer, that the evidence would be followed by proof showing that the plaintiffs were chargeable with notice when they took the bill, doubtless the proposed evidence would have been admitted. Therefore we think it would be unjust to all concerned to consider any other question than the main one which is discussed by counsel, viz: When the company had shown, or offered to show, that the bill was obtained by the payee through fraud, did the burden rest with the plaintiffs, in addition to what they had already shown, of proving a want of notice; or was it incumbent upon the company to prove that they had such notice? The counsel for the company insists that when it was shown that the bill was fraudulently obtained, then the *prima facie*

Reeve and another vs. The Liverpool, London & Globe Ins. Co. and another.

presumption of good faith was overthrown, and the burden of proof shifted from the company to the plaintiffs, who were required to show not only that they purchased the bill for value in the usual course of business, as they did do, but were further bound to prove that they took it in good faith, without notice of any fraud. It was incumbent on the plaintiffs, as the counsel claims, to establish both of these facts when it appeared that the bill was fraudulently obtained by the payee from the company; and in support of this position he has cited a large number of authorities which contain language bearing more or less directly upon the question before us. But we think a careful examination of these authorities will show that they do not meet the precise point to which they are cited.

It will be borne in mind that as a part of their case, the plaintiffs had shown that they purchased the bill of the payee the day after its date, paying therefor its face; and the fact that they were bankers doing business in Oshkosh is admitted by the pleadings. The state of the proof then, so far as they were concerned, was this: They had proven that they had taken the paper before maturity, in the usual course of business, and had paid therefor full value. These facts were clearly established. When it appeared that the bill was fraudulently obtained by the payee, were they bound to go further and show that they had no notice of any fraud, in other words, to prove a negative? Or was the *onus probandi* cast upon the company of showing notice? This precise question is considered and decided in *Catlin v. Hansen*, 1 Duer, 310; *Hart v. Potter*, 4 id., 458; *Ross v. Bedell*, 5 id., 462. In *Catlin v. Hansen*, CAMPBELL, J., says: "When the plaintiff shall have shown that he is a holder for value, upon whom does it rest to give the proof as to notice? We think the burden of proof shifts back upon the defendant. It may often occur that the plaintiff, in giving proof of value paid, will furnish for the defendant evidence of notice, in cases where

Reeve and another vs. The Liverpool, London & Globe Ins. Co. and another.

there has been collusion. But where the plaintiff is really a *bona fide* holder, it may well be that he may prove the payment of value without being able to give any evidence as to notice, because none exists. Besides, as the law now is in this state, the defendant has always the means of proof in his power, in all cases where he can rely upon the oath of the plaintiff, because he can at will place him on the stand as a witness. In cases, therefore, where there is fraud, or strong suspicion of fraud, made out by the defendant, the holder of a promissory note or bill of exchange, who sues for its recovery, must then show that he received it before its maturity, and for a valuable consideration; and if he succeeds in this proof, the defendant, to defeat a recovery, must establish, if he can, that the note was received by such holder with notice of the fraud." p. 324.

Within the doctrine of these cases, which are the only ones to which we were referred where the question of the burden of proof as to notice is considered, the plaintiffs were not bound to show, in addition to what they did prove, that they had no notice of the fraud in obtaining the bill by the payee, if fraud there was. The burden of proving facts sufficient to charge them with notice rested on the company; and this evidence it was not proposed or offered to give on its part. Unless this evidence were given, that excluded would be no defense to the action. We do not understand the court ruled that it was necessary to show that the plaintiffs took the bill with positive knowledge of the fraud; but that they took it under such circumstances as to fairly charge them with notice, or put them on inquiry. We see no valid objection to that ruling.

These remarks dispose of the material point in the case, and must result in the affirmance of the judgment.

By the Court.—The judgment of the circuit court is affirmed.

Sellers vs. The Union Lumbering Company.

SELLERS VS. THE UNION LUMBERING COMPANY.

HIGHWAYS. (1) *What rivers of this state are highways.*STATUTES: FRANCHISE. (2) *Right to take tolls a franchise.* (3) *Statute granting franchise must designate a certain grantee.*

1. The doctrine of *Whisler v. Wilkinson*, 22 Wis., 572, that the rivers of this state of sufficient capacity to float logs to mill or market are public highways, followed.
2. The right to collect tolls upon logs put into a river, granted by a statute, is a franchise, and like other property must have a certain owner.
3. Ch. 12 of 1873, by its terms, authorizes any person, company, corporation, their successors or assigns, who shall, at a prescribed expense, have improved a certain river by prescribed works, and shall keep the same in repair, so as to facilitate the floating of logs, to collect certain tolls upon logs put into the river. *Held*, that the statute purports to grant the franchise, not to one person, or company of persons, or corporation, but to every person improving the river according to the terms of the statute, whether before or after its passage; and it is void for want of a *certain grantee*.

APPEAL from the Circuit Court for *Chippewa* County.

Action for a balance claimed to be due plaintiff on a sale of certain saw logs. The defendant, in its answer, among other counterclaims, set up a claim, under ch. 12, Laws of 1873, for toll upon certain logs floated by the plaintiff down the Yellow river, by the aid of its improvements constructed therein prior to November, 1872, and down to the commencement of the action, and alleged by it to have been erected and maintained at an expense of eighteen thousand dollars.

Upon the trial, all testimony under this counterclaim was excluded by the court; and the plaintiff had a judgment, from which the defendant appealed.

J. M. Bingham, for appellant, as to the power of the legislature to pass laws providing for the payment of toll, cited *Cooley's Con. Lim.*, 91, 650, 651; 1 *Kent's Com.*, 422 and note; 1 *Wood. & Min.*, 401; *Wadsworth v. Smith*, 11 *Me.*,

Sellers vs. The Union Lumbering Company

278; *People v. Fisher*, 24 Wend., 220; *People v. Draper*, 15 N. Y., 532, 543; and as to the control of the state over its streams, *Veazie v. Moor*, 14 How. (U. S.), 568; *Palmer v. Cuyahoga Co.*, 3 McLean, 226; *Kellogg v. Union Co.*, 12 Conn., 7. The defendant's improvements in the river had been made before plaintiff's logs were cut or put in. Defendant was justly entitled to pay for the use of its improvements, but it being without a remedy in law, the legislature interfered and gave it one.

W. P. Bartlett, for respondent:

The Yellow river was a navigable stream. *Morgan v. King*, 35 N. Y., 454. Unequal and partial legislation upon general subjects is in violation of the constitution, though not in conflict with any particular provisions thereof. *Calder v. Bull*, 3 Dallas, 386; *Durkee v. Janesville*, 28 Wis., 464. Ch. 12, Laws of 1873, is not general, applying to all citizens, but only to those who may have made improvements prior to its passage. Again, plaintiff's logs having been put into the river before the passage of the act, such act, as applied to them, is retroactive, imposing an obligation where none before existed, against the will of the persons to be charged, and is void for that reason. *Hasbrouck v. Milwaukee*, 13 Wis., 37; 1 Kent, 455; Smith's Com., §§ 347, 382; *Atkinson v. Dunlap*, 50 Me., 111; *People v. Frisbie*, 26 Cal., 135; *Davis v. Menasha*, 21 Wis., 491; *State v. Atwood*, 11 id., 422; *Austin v. Burgess*, 36 id., 187.

RYAN, C. J. It was agreed by counsel on the argument that Yellow river, the subject of ch. 12 of 1873, was, prior to the passage of that statute and to the improvement of it by the appellant, of sufficient capacity to float logs; though its capacity was materially increased by the works of the appellant. The river was therefore a public highway. *Whisler v. Wilkinson*, 22 Wis., 572.

The statute of 1873 authorizes any person, company or cor-

Sellers vs. The Union Lumbering Company.

poration, their successors or assigns, who *shall have*, at prescribed expense, improved the river by prescribed works, and shall keep the same in repair, so as to facilitate the floating of logs, to collect certain tolls upon logs put into the river. Of course the right which the statute assumes to grant, is a franchise. 2 Black., 38; *Plankroad Co. v. Reynolds*, 3 Wis., 287; *Chapin v. Crusen*, 31 id., 209.

A franchise is property; an incorporeal hereditament (2 Black., 37; 2 Stephen's Com., 14); a certain privilege conferred by grant from government and vested in an individual. 3 Kent, 458. "Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right." *Bank v. Earle*, 13 Pet., 519.

Like every other kind of property, a franchise must have a certain owner. It can only exist by grant; for title by prescription presupposes a grant. *Trotter v. Harris*, 2 Y. & J., 285. And a certain grantee is essential to a grant. 2 Black., 296, 317, 347.

In England, franchises were formerly granted by the crown only to persons or corporations; latterly, corporate franchises are commonly granted by parliament. In this country, franchises proceed from the legislative power, and are very generally granted to corporations. Indeed the right of incorporation is said to be itself a franchise. 2 Black., 37; Ang. & Ames on Corp., sec. 4. A corporation may be presently created by the terms of a statute, without condition precedent or preliminary. But very commonly, charters are framed, not of themselves creating, but authorizing the formation of corporations upon preliminary conditions. Under the former class of charters, the corporation created is the grantee of the franchises conferred. Under the latter class, neither the franchise to be a corporation, nor the particular franchise conferred, takes effect before the actual formation of the corporation. When the corporation is formed, the franchises con-

Sellers vs. The Union Lumbering Company.

ferred vest in it as grantee. *Att'y General v. Railway Companies*, 35 Wis., 599. Franchises so conferred are like any other estate granted upon condition precedent, the estate vesting upon condition fulfilled. But like every other operative grant, franchises so conferred have a certain grantee.

We are not able to agree with the learned counsel for the appellant in the construction of the statute in this case. The franchise is granted to any one who shall have improved the river; that is, who shall have done so at any time before the right to collect toll shall accrue. And so the franchise runs to any one improving the river according to the terms of the statute, whether before or after its passage, to take toll in right of his improvement.

And the franchise is not to one person or company of persons or corporation; but expressly to any person, that is to every person, who shall have improved the river in the terms of the statute. We see no reason why, under the statute, other persons or corporations, thinking the improvement of the appellant insufficient, may not again spend the sum required by the statute in further improvement of the river, and thereupon claim a like franchise to that claimed by the appellant, and so subject lumber floating down the river to an indefinite number of distinct tolls, each to the full measure of the statute. This was the construction given to a statute of Michigan, in this particular not unlike the statute before us. *Ames v. Port Huron Co.*, 11 Mich., 139. We are unable to give any other construction to the statute under which the appellant claims. This would not only be most oppressive in practice, but might well of itself render the whole grant void for duplicity. See 2 Black., 37; Wilcock, 27, cited in *Stroud v. Stevens Point*, 37 Wis., 367; 2 Rolle's Abr., 191, n. 2, 3.

The ingenious position was taken for the appellant, that the statute has relation to improvements of the river already made at the time of its passage; and that the appellant only having then improved the river as required by the statute, must be

McRae vs. Hogan and others.

held to be the sole grantee of the franchise. Of course the position fails in our construction of the statute, even if it were competent to ascertain by parol the grantee of an indefinite franchise intended by a statute. And we may say in passing that it is inconceivable why, if the legislature intended to grant the franchise to the appellant, it should not have said so in plain words, instead of hiding its intention in such inapplicable terms.

We are quite clear that the statute indicates no grantee of the franchise; that the grant is to any and every person who may choose to avail himself of it; that the franchise fails for want of a grantee; and that the grant is void for uncertainty. And we may be permitted to say that, if the legislature had power to do it, it would be most unwise and dangerous to create franchises in so loose a manner, for any one to assume and relinquish at pleasure; to grant tolls upon a public highway to any person who should voluntarily assume to spend his money in the improvement of it. Courts have always been jealous of such grants, so loose and so liable to abuse, and we hope will always be so.

By the Court. — The judgment of the court below is affirmed.

McRAE vs. HOGAN and others.CONSTITUTIONAL LAW. *Uniformity of town and county government.*

Ch. 458, P. & L. Laws of 1869, which attempts to take from the possession and control of the town officers in Chippewa county a portion of the moneys raised in their towns for highway purposes, and entrust its expenditure to the county board, contrary to the general law (ch. 19, R. S.), violates sec. 23, art. IV of the state constitution, which requires the system of town and county government to be as nearly *uniform* as practicable.

VOL. XXXIX. — 34

McRae vs. Hogan and others.

APPEAL from the Circuit Court for *Chippewa* County.

This action was brought by the treasurer of Chippewa county against *Hogan*, as treasurer of the town of Eagle Point in said county, and his sureties; and the complaint avers in substance, that said town treasurer, prior to March 1, 1875, had collected for highway taxes on lands lying north of a line drawn east and west through the south line of township thirty-three in said county, the sum of \$2,898; that by ch. 458, P. & L. Laws of 1869, it became his duty to pay over said sum to plaintiff as county treasurer; and that he had refused to do so, on demand.

The defendants demurred, on the ground that the complaint did not state a cause of action; and the plaintiff appealed from an order sustaining the demurrer.

J. M. Bingham, for appellant, contended that the constitution of this state does not prohibit the legislature from appointing any agent it may think proper, to disburse public moneys. Dillon on M. C., §§ 34, 35, with cases cited in the notes, and ch. 19, p. 560; *Mayor, etc., v. Board of Police*, 15 Md., 376; *People v. Draper*, 15 N. Y., 532. Within the constitution, the legislature may appropriate the public moneys for local or private purposes; may impose a tax upon the whole state or any portion thereof, or upon any particular and specified kind of property; may determine what sums shall be raised by taxation, and the purposes to which the money shall be applied, including any purposes which it may itself judge to be promotive of the public good. *Town of Guilford v. Sup'r's Chenango Co.*, 13 N. Y., 146-8; *Borough of Dunmore's Appeal*, 52 Pa. St., 374. The act here pleaded, regulating the disposition of the highway tax collected in towns north of town 33, does not violate the constitutional provision concerning uniformity of town and county government. The system of expending highway taxes under the direction of the county board of supervisors has been in force for a number of years in several counties of the state; and the county board

McRae vs. Hogan and others.

have power, by resolution, to determine upon what roads and what portions of the county highway taxes raised in any city or village may be used, provided said city or village does not, by resolution, within thirty days after the tax is raised, determine where it shall be expended. And a city, town or village has power to apply the same funds outside of its own limits. Tay. Stats., 307, 307a, 307b. Courts will not hold legislative acts unconstitutional, unless they are clearly so. *Sydnor v. Palmer*, 32 Wis., 406. The general law for the disposition of the highway tax requires it to be expended in the territory or district where raised. The act in question merely provides that the tax shall be expended north of a certain specified line. It does not *require* the supervisors to expend in one town the taxes raised in another; and it must be *presumed* that they will obey the general law in that respect. Counsel further argued that the system of town and county government is merely required to be "as nearly uniform as practicable;" that geographical differences in counties may require differences in the system (*State ex rel. Keenan v. Sup'rs*, 25 Wis., 350); that by reason of the enormous extent from north to south of some towns in Chippewa county, while the majority of the population is at the southern extremity, the general method provided by law for the disposition of the highway taxes in such towns is not "practicable," because it tends to great injustice; and that the legislature, by the act in question, has expressed its judgment to that effect, and is the sole judge of that question.

W. P. Bartlett, for respondents, contended that ch. 458, P. & L. Laws of 1869, was inconsistent with the general laws applicable to all towns in this state except those of Chippewa county, regulating the duties of town treasurers in the collection and payment of highway and other taxes, the duties of overseers of highways in keeping roads in repair and in expending the highway taxes collected in their towns (R. S., ch. 19), and the liability of towns for defective highways (Tay.

McRae vs. Hogan and others.

Stats., 513); and that the act is invalid under the constitutional provision requiring uniformity of town and county government. *State ex rel. Walsh v. Dousman*, 28 Wis., 541; *State ex rel. Peck v. Riordan*, 24 id., 484; *State ex rel. Keenan v. Supervisors*, 25 id., 339.

COLE, J. The invalidity of ch. 458, P. & L. Laws of 1869, is to our minds a point too plain to admit of discussion. The act requires the town treasurers of the several towns in Chippewa county to pay over to the county treasurer of the county all moneys received by them for highway taxes on all lands lying north of a designated east and west line; and the county treasurer is directed to pay over such moneys on the order of the county board of supervisors. The county board is authorized and required to expend these moneys in the building of wagon roads up the Chippewa river and its tributaries, the roads to commence at the designated line referred to above and to extend up said river and tributaries. This is the substance of the act in question. Its manifest purpose and design are, to take from the possession and control of the officers of the towns a portion of the moneys raised in the towns for highway purposes, and intrust its expenditure to the county board. The act is clearly and flagrantly in violation of sec. 23, art. IV of the constitution, as that provision was interpreted by this court in the cases of *State ex rel. Peck v. Riordan*, 24 Wis., 484; *State ex rel. Keenan v. The Supervisors of Milwaukee County*, 25 id., 339; and *State ex rel. Walsh v. Dousman*, 28 id., 542.

Under the general law (ch. 19, R. S.), the supervisors of the several towns are, by virtue of their office, commissioners of highways in their respective towns, and have power to lay out highways. It is made the duty of such supervisors, and of the overseers of highways, to keep the highways and bridges in their respective towns in sufficient repair; and towns are made liable for any damage which shall happen to any person

 Siegbert and others vs. Stiles.

by reason of the insufficiency or want of repair of any bridge or public highway. Provision is made for levying and collecting highway taxes, which are expended by the officers of the town. This is the general system. While the liability of the towns affected by the act continues, a portion of the highway taxes raised in the towns is taken from the control of the town officers, and placed under the control of the county board. And in respect to the control and expenditure of that amount of the highway tax, the act attempts to confer upon the county board all the powers and duties of the town officers. It is difficult to imagine a more plain and palpable violation of the principle of uniformity in the system of town and county government than is furnished by the act. The cause of action stated in the complaint is founded on this law, and falls with it.

By the Court.—The order of the circuit court sustaining the demurrer to the complaint is affirmed.

 SIEGBERT and others vs. STILES.

CONTRACTS: LEGAL HOLIDAYS. (1, 2) *Contracts maturing by their terms on a legal holiday or Sunday, held to mature the next preceding day.*

CONTRACTS: DAMAGES: MARKET PRICE: EVIDENCE. *Evidence of market price at McGregor, Iowa, admitted to show market price at Prairie du Chien, in this state.*

1. Under ch. 248 of 1862 (Tay. Stats., 836, § 14 and 1342, § 21), the first day of January is a legal holiday in this state.
2. By ch. 243 of 1861 (Tay. Stats., 836, § 12), commercial paper maturing on Sunday or on a legal holiday, becomes due and payable on the next preceding secular day; and by analogy to this statute, where any other contract by its terms matures on a Sunday or legal holiday, it will be held to mature on the next preceding secular day.
3. Where the question was, what was the market price of hogs on the 31st of

Siegbert and others vs. Stiles.

December, at Prairie du Chien in this state, plaintiff's proof of such market price not being certain or satisfactory, it was error to reject defendant's offer to show the market price in McGregor, Iowa, on the same day.

4. The court will take notice that Prairie du Chien and McGregor are separated only by the Mississippi river; that during the winter when the river is frozen, each of these towns may be easily and speedily reached from the other; and that, consequently, there could not be any considerable difference in the market value of hogs at the two places.

APPEAL from the Circuit Court for *Crawford* County.

Under date of December 6, 1873, the defendant agreed in writing to sell and deliver to the plaintiffs, on the first day of January then next, five hundred marketable hogs in a frozen condition, at five dollars per cwt., each hog to weigh not less than two hundred pounds. The plaintiffs were ready and willing to receive the hogs and pay for them, at the agreed time; but the defendant failed entirely to deliver them. This action was for damages for such failure. The plaintiffs had a verdict and judgment for \$1,050, damages; and the defendant appealed.

Geo. C. Hazelton and *H. S. Orton*, for appellant, contended, among other things, that it did not clearly appear, from the evidence in this case, that there was a market and a fixed value for dressed hogs at Prairie du Chien, at the time of delivery fixed by the contract; and that the court erred in rejecting the evidence of the market price at McGregor, offered for the purpose of showing that the prices at Prairie du Chien were fictitious, made by the plaintiffs for the purposes of this contract. *Wemple v. Stewart*, 22 Barb., 154; *Birdsey v. Butterfield*, 34 Wis., 62, and cases there cited. The rule of evidence adopted by the court below would open the door to every dealer, having sufficient capital, to make his contracts and then run up the prices in the local market to such an extent as to ruin his victims.

O. B. Thomas, for respondents:

Defendant's offer to prove the price of dressed hogs at

Siegbert and others vs. Stiles.

McGregor was accompanied by an offer to show that the markets at that place and Prairie du Chien were both governed by Chicago and Milwaukee; and the court permitted defendant to prove the prices at that time in the two governing markets, and the cost of transportation to them from Prairie du Chien. If defendant's statement was true, that both places were governed by the same market, the ruling could do him no harm; if it was not true, an admission of evidence of prices at McGregor, which the plaintiff could not have anticipated, would have been an injustice to the plaintiff. There might have been a greater competition in McGregor between buyers, or a greater supply of dressed hogs offered there than at Prairie du Chien; or persons might at that time have been depressing the market at the former place for speculative purposes. Plaintiff was not prepared to show any of these facts in relation to the McGregor market, because he could not anticipate the introduction of evidence relating to that market.

[Counsel on both sides discussed at length several questions not passed upon by the court.]

LYON, J. The contract for the delivery of the hogs, by its terms, matured on the first day of January, and that was a legal holiday. Laws of 1862, ch. 248 (Tay. Stats., 836, § 14; 1342, § 21). Commercial paper, maturing on Sunday or on a legal holiday, becomes due and payable on the next preceding secular day. Laws of 1861, ch. 243 (Tay. Stats., 836, § 12). There are many cases in the books which hold that when the day of performance of a contract, other than an instrument upon which days of grace are allowed, falls on Sunday, and probably also when it falls on a holiday, performance on the next secular day is sufficient; but the cases do not seem to be entirely uniform on the subject. We do not care to comment on those cases, or even to cite them, for we are satisfied that the rule fixing the time for the performance of all contracts which by their terms mature on Sunday or on a holiday,

Siegbert and others vs. Stiles.

should be uniform, and that no distinction in this respect should be made between commercial paper and other contracts. Hence, by analogy to the statute last above cited, we hold that the contract of December 6th matured December 31st, and the plaintiffs were entitled to delivery of the hogs on that day.

The market price of hogs of the kind and quality called for by the contract, on the 31st of December, 1873, in Prairie du Chien, was greater than the contract price. The difference being the measure of the plaintiffs' damages, it was essential to ascertain the market price on that day at Prairie du Chien, in order to assess such damages correctly. Testimony bearing upon the subject of such market price was introduced on the trial by both parties, and it tended to show the market price of such hogs on December 31st and January 2d, at Chicago, Milwaukee, Prairie du Chien and Bridgeport (the latter being a station on the railway six miles east of Prairie du Chien), and also the price for which one lot of hogs was sold in Prairie du Chien on January 1st.

The defendant produced one J. M. Gilchrist as a witness, for the purpose of proving the market price of like hogs in McGregor, Iowa, when the contract in suit matured. The witness having testified that in the winter of 1873-4 he was engaged at McGregor in purchasing and shipping hogs, the plaintiffs objected to any testimony showing the McGregor market on December 31st or January 2d. The defendant proposed to prove by the witness (among other things) that the Prairie du Chien and McGregor markets were the same as to prices, both being controlled by the Chicago and Milwaukee markets. The court sustained the objection, and rejected the offered testimony.

I suppose we are permitted to know (although we may find no proof of those facts in the record) that Prairie du Chien and McGregor are only separated by the Mississippi river, and that during the winter, when the river is frozen, each town

Siegbert and others vs. Stiles.

may easily and speedily be reached from the other. When the defendant failed to deliver the hogs, if the plaintiffs could have supplied themselves in the McGregor market with the same number and quality of hogs, at a given price, that fact would tend to show that like hogs could not be worth a much greater price in the Prairie du Chien market. As a matter of course, the market price of any staple in the interior towns, where such staple is gathered directly from the producers and shipped to some great market, is governed by the prices therefor which prevail at such market; and the conditions being the same at any two shipping points, the market price for the staple must necessarily be substantially the same at both points. Hence it is apparent that the market price of hogs in those great marts for that staple, Chicago and Milwaukee, must necessarily control to a great extent the market price therefor in Prairie du Chien and McGregor, and that there cannot be any considerable difference in such price at the two latter points. In the record before us the proof of the market price of hogs in Prairie du Chien on the 31st of December, 1873, is not very certain or satisfactory; and we think the circuit court should have received the offered proof of McGregor market prices on that day, as tending to show such market price at Prairie du Chien.

Because that testimony was rejected, there must be a new trial.

By the Court.—Judgment reversed, and *venire de novo* awarded.

Pepper and others vs. O'Dowd.

PEPPER and others vs. O'DOWD.

STATUTE OF LIMITATIONS: ADVERSE POSSESSION. *Limits of constructive adverse possession defined.*

1. Secs. 6 and 7, ch. 138, R. S., relating to adverse possession under paper title, must be considered together as one entire provision; the former giving the general rule, and the latter defining certain particular conditions of such adverse possession.
2. Under these sections, actual adverse possession of part of a single lot or of a known farm does not operate as constructive adverse possession beyond the limits of such lot or farm, even where it is part of a more extensive tract included in the instrument or judgment under which the occupant entered.
3. Subds. 3 and 4 of sec. 7 are independent of each other, and under the former, actual possession of part of an uninclosed lot by its use for fuel or fencing for the ordinary use of the occupant, will probably, under proper circumstances, operate as constructive adverse possession of the whole lot; but, under the limitation of sec. 6, it can in no case so operate beyond the limits of the same lot.
4. Being independent, both subdivisions cannot support the same possession of the same premises; and an ambiguous possession claimed in part under each, and not supported by either alone, is not within the statute.
5. In subd. 4, the word "included" must be construed in the sense of "inclosed."
- [6. As applied to a single lot, subd. 4 may operate to limit the effect of subds. 1 and 2, by requiring the improvement or inclosure to be "according to the usual course and custom of the adjoining country;" subd. 4 making actual possession by improvement or inclosure of a part, constructive possession of the whole, only where the unimproved or uninclosed part is left so according to such course and custom.]
7. The "single lot" of the statute is the smallest legal subdivision of land; and its extent is certain of itself, without recourse to any course or custom.
8. The "farm" of the statute is land held for cultivation and cultivated in whole or in part, of whatever size, shape or boundaries, and whether comprising several lots or parts of lots, or less than one lot.
9. It being the purpose of the section to confine constructive adverse possession to such visible and notorious possession as may fairly imply notice and acquiescence, the extent of the "farm" of subd. 4 must be "*known*" in the sense of being *notorious*.

 Pepper and others vs. O'Dowd.

10. To constitute adverse possession, entry must be made with defined claim of title and of possession; and after entry, such claim cannot be enlarged, except by acts equivalent to a new entry and new claim of adverse possession.
11. Entry upon part of a lot under claim of title to the whole, while the other part is held adversely, cannot found adverse possession of the whole lot, though afterward the adverse possession of the other part be abandoned.
12. To establish adverse possession of a known farm, outside of the actual possession taken, the known extent of the farm *at the time of entry* must be established, and adverse possession founded on such entry is limited to that extent.
13. Constructive adverse possession of uninclosed land under subd. 4 can be established only by actual proof of a course or custom in the adjoining country, sanctioning the manner of occupation.
14. To make the actual adverse possession of part of a tract of farming land once possessed and used as several farms, by several owners, constructive adverse possession of the whole tract as one farm, it must be shown, not merely that the whole tract is included in some of the claimant's title papers, but that the several farms had been joined together in one known farm *before* the entry under which he claims, and constituted one known farm at the time of such entry.
15. The actual use of one lot for fuel or fencing under subd. 3, sec. 7, cannot carry with it constructive use of the same piece of timber on another lot. To come within that subdivision, it seems that the land must be held in good faith for the supply of fuel or fencing for the purposes there named, *as its sole or principal object*; the *extent* of the land so used must bear a reasonable proportion to the use; and such use must be distinct, visible, continued and notorious, under claim of title, and not mere casual trespass or occasional use; and what is a *reasonable quantity* in each case is a question *for the jury*, under proper limitation and instruction.

APPEAL from the Circuit Court for Iowa County.

Ejectment, commenced in 1872, for one hundred and sixty acres of land in Iowa county. The answer alleged adverse possession under color of title for more than ten years, by defendant and those under whom he claimed, and pleaded the statute of limitations. * On the trial, defendant introduced a

* Secs. 6 and 7, ch. 138, R. S., are as follows: "Sec. 6. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of

Pepper and others vs. O'Dowd.

number of deeds through which he traced his claim of title; but none of these appeared to connect him with the original government title shown by plaintiffs to have passed by patent to their ancestor, Harvey Pepper; and no acts of possession of the premises were shown except those of defendant himself and his immediate grantor.

The deed to defendant's grantor, made in 1846, purported to convey 680 acres, including the land here in dispute, with neighboring lands. The tract comprised what had been previously known as two separate farms, viz: the Pepper farm, here in dispute, and the Miller farm.

Defendant's grantor moved his family into a house upon the Miller place, cultivated part of it, and paid taxes upon the whole tract; but none of the Pepper farm was inclosed by him or cultivated. The only use apparently made of this part of the 680 acres, was for cutting timber, which he did indiscriminately upon all parts of the premises in dispute, as well as upon other woodland owned by him (of which he had a large quantity), as he needed timber for fuel or fencing and also for purposes of sale.

the premises in question, or upon the judgment of some competent court, and that there has been a continual occupation and possession of the premises included in such instrument or judgment, or of some part of such premises, under such claim for ten years, the premises so included shall be deemed to have been held adversely; except that when the premises so included consist of a tract divided into lots, the possession of ~~one~~ lot shall not be deemed the possession of any other lot of the same tract.

"Sec. 7. For the purpose of constituting an adverse possession by any person claiming a title founded upon some written instrument or some judgment, land shall be deemed to have been possessed and occupied in the following cases: 1. Where it has been usually cultivated or improved. 2. Where it has been protected by a substantial inclosure. 3. Where, although not inclosed, it has been used for the supply of fuel, or of fencing timber, for the purpose of husbandry or the ordinary use of the occupant. 4. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not included according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated."

Pepper and others vs. O'Dowd.

Defendant, after his purchase in 1861, continued to haul wood to market from said land, paid the taxes, and occasionally cut hay thereon, but did not actually inclose or improve any part of it until within about five years previous to the commencement of the action. The plaintiffs asked the court to give the following among other instructions: 1. That "the use by the defendant or his grantor of the land in question, or a part of it, in common with several other tracts lying in several different sections, comprising in all eight hundred acres of timbered land in a body, for the supply of fuel or fencing timber, would not be within the intendment of the statute of limitations in relation to adverse possession of land by its use for the supply of fuel or fencing timber, unless the jury shall find from the evidence that the quantity claimed was reasonably necessary to supply his actual farm with fuel and fencing timber." 2. That possession of one lot or congressional subdivision of land would not be possession of any other, unless the jury should find that the defendant had established by clear and positive proof that the whole tract claimed by his grantor constituted, according to the custom of the country, a known farm or single lot. 3. That "under the pleadings and proofs, subd. 4 of sec. 7 of the statute of limitations does not apply to this case;" because "this large tract of forest cannot be considered a known farm or single lot." 4. That "this land being divided into forty-acre lots, the facts establishing continued adverse possession must be proved as to each lot." The court refused to give the three instructions first recited, and gave the fourth, modified by adding the following: "This is correct when the unoccupied lot does not constitute part of a known farm."

The court then instructed the jury, in effect, that if the tracts cultivated, together with the lands in question, with or without the other lands mentioned in the deed to defendant's grantor, constituted what might be called a known or recognized farm, then the adverse possession was sufficient, even if

Pepper and others vs. O'Dowd.

the defendant or his grantor had never taken timber from the Pepper land, so called, for the purpose of fencing or fuel; that a tract of new land covered with forests, if intended to be cultivated by one man as owner, is called a farm; that land, though not a part of a known farm, and not inclosed, may be held adversely so as to set the statute of limitations running, where it is used for the supply of fuel or fencing timber, for the purpose of husbandry or the ordinary use of the occupant; and that the quantity of timber which a farmer ought to be allowed for the present and prospective use and improvement of his farm, could not at present be established by any settled custom; but when there was no fraud, or insincerity or palpable absurdity in the claim, every farmer should be allowed to judge for himself how much of his land he would devote to timber, and how much to the plow.

Verdict and judgment for the defendant; and the plaintiffs appealed.

A. R. Bushnell, for appellants, as to the construction to be given the statute of limitations, and the sufficiency of the acts shown to constitute an adverse possession, cited *Sydnor v. Palmer*, 29 Wis., 251; *Wilson v. Henry*, 35 id., 245; *State v. Supervisors of Sheboygan Co.*, 29 id., 79; *Smith's L. C.*, 637; *Tyler on Eject.*, 900; *Simpson v. Downing*, 23 Wend., 320; *Munro v. Merchant*, 28 N. Y., 44; *Dupont v. Davis*, 35 Wis., 643; *Bouvier's Law Dic.*, "Farm;" 2 Binn., 238; 18 Pick., 553; 6 Met., 529; 2 Hilliard on R. P., 338 et seq.

J. M. Smith, for respondent, to the point that defendant's entry and the extent of his claim and possession must be referred to his deed and measured by it, cited *Stevens v. Brooks*, 24 Wis., 326; *Sydnor v. Palmer*, 29 id., 226; *Tyler on Eject.*, 495-6, 897, 904; 10 Pet., 412; 1 Chip., 92; 8 Cranch, 229; 4 Mason, 330; *Paine's C. C.*, 457; 3 Wash. C. C., 475; 3 Ired., 578; 2 Tay., 131; 1 Strob., 143; 1 Scam., 181, 186; 23 Cal., 431; 37 Miss., 155; 33 Barb., 386; and he argued that where a "known farm" is partly uninclosed, the only safe rule for de-

Pepper and others vs. O'Dowd.

termining the extent of the occupant's adverse possession is, to be governed by the boundaries in his deed.

RYAN, C. J. This case involves the construction of secs. 6 and 7, ch. 138, R. S., and especially subdivisions 3 and 4 of sec. 7.

These sections were copied from the New York revision of 1829, part 3, ch. 4, secs. 9 and 10, with some verbal differences of no significance here, except the substitution of ten years in sec. 6 for twenty in the New York statute. Here, as well as in New York, these sections clearly limit and define the entire rule of constructive adverse possession. All constructive adverse possession under the statute must come within some of the conditions which the statute gives. And, in giving construction to these, any nice consideration of the rules of decision outside of the statute would, we think, be quite unavailing. The questions before us are new here, and seem to have been the subject of but little authoritative discussion in New York. *Simpson v. Downing*, 23 Wend., 316; *People v. Livingston*, 8 Barb., 263; *Munro v. Merchant*, 26 id., 383; 28 N. Y., 9; *Dominy v. Miller*, 33 Barb., 386.

The two sections must be considered together as one entire provision; for they are not only *in pari materia*, but are clearly dependent on each other. Sec. 6 gives the general rule of adverse possession under paper title; and sec. 7 defines certain particular conditions of such adverse possession. *Sydnor v. Palmer*, 29 Wis., 253. We cannot regard sec. 6 and subds. 1, 2 and 3 of sec. 7, as giving different rules, as the New York court of appeals seems to have thought. *Munro v. Merchant*, *supra*.

Sec. 8 limits adverse possession, under claim other than upon paper title, to actual possession only. Sec. 6 enacts what was generally recognized as the law before the statute, that when one enters into and holds continual possession, under a paper title, of part of the premises included in it, he

Pepper and others vs. O'Dowd.

shall be deemed to hold adversely all the premises included in it; that is, when one enters under color of title, he is presumed to enter claiming according to the extent of his title (*Sydnor v. Palmer*, 29 Wis., 226), and where there is no adverse possession, the law will construe his entry to be coëxtensive with his title (*Ellicott v. Pearl*, 10 Pet., 412); "except that when the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed the possession of any other lot of the same tract." This exception materially restricts the rule of constructive adverse possession, as held before the statute; and unquestionably enters into every condition of adverse possession under these sections, save only in the instance of a *known farm*, substituted by subd. 4 of sec. 7 for a *single lot*. And so, under these sections, actual adverse possession of part of a single lot or a known farm shall not operate as constructive adverse possession beyond the limits of such lot or farm.

The object of the exception is sufficiently intelligible. Before the statute, adverse possession, to bar the true title, should be visible and notorious. Hare and Wallace's notes, 2 Smith's Lead. Cas., 561; *Hawk v. Senseman*, 6 S. & R., 21. Being visible and notorious, the true owner was presumed to have notice of it and to acquiesce in it. But although the actual possession of some of the premises claimed might be so visible and notorious as fairly to imply notice and acquiescence, there was danger in extending such possession by construction to all of the premises claimed; for this could not always be visible and notorious, so as to raise a fair presumption of notice and acquiescence. The paper title might be relatively extensive, and the actual possession relatively limited. And it might often be unsafe to hold actual adverse possession of one or some of several parcels, under one title, as constructive adverse possession of all the parcels; so as to bar the right of the true owner, however insignificant the actual possession might comparatively be. The difficulty lay in connecting the

actual possession with the extent of the paper title. And the presumption that actual possession of some of the premises claimed under one title, should operate as visible and notorious adverse possession of the whole, really implied another presumption, perhaps seldom true in fact, that the extent of the paper title was as visible and notorious as the actual possession. Where the paper title covered several distinct lots, possession of one lot under it could not always be, perhaps seldom was, fair notice of possession claimed in the others. But as possession of part of a single lot may well imply a visible and notorious claim of title and possession to the whole of it, the danger of injustice from the doctrine of constructive adverse possession is greatly lessened, if not wholly removed, by confining it to the single lot within which the actual possession is taken and maintained. This is our understanding of the intent of the sections under consideration. See revisers' notes, 5 Edmunds' Stats., 430; *Simpson v. Downing*; *Munro v. Merchant*.

Sec. 6 having determined the general rule, that actual possession of one lot shall not be deemed constructive possession of any other lot, sec. 7 proceeds to define some conditions of adverse possession under sec. 6. And these are distributed into four instances:

1. Cultivation or improvement.

2. Protection by a substantial inclosure. Whether and in what circumstances, under these two subdivisions, cultivation or improvement in the one case, or inclosure in the other, of part of a single lot could be held constructive adverse possession of the whole lot, except under the conditions of subd. 4, are questions not before us in this case.

3. Use of uninclosed land for fuel or fencing, for the ordinary use of the occupant. *Du Pont v. Davis*, 35 Wis., 631. This subdivision, as reported by the New York revisers, was limited by the words, "for the purposes of a farm of which it forms a part." The legislature there rejected those words,

Pepper and others vs. O'Dowd.

and substituted the limitation found in the section as adopted by the legislature here, "for the purpose of husbandry or the ordinary use of the occupant." The language adopted and the language rejected alike indicate that this subdivision is independent of subd. 4. 26 Barb., 383.

These three instances are obviously held by the statute as equivalent to actual possession, independent of any other possession. If such actual possession be of less than a whole lot, it may, in proper circumstances, probably under subd. 3 and possibly under subds. 1 and 2, operate as constructive adverse possession of the whole lot. But such actual possession certainly can, under the limitation of sec. 6, be carried, in no case, as constructive adverse possession, beyond the limits of the same lot.

These three subdivisions have defined actual adverse possession, leaving constructive possession arising from it to the general rule of sec. 6. But the fourth subdivision appears to give a rule of actual and constructive adverse possession for itself.

4. "Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not included according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved or cultivated."

The word *included* is found in this subdivision, apparently by inadvertence, instead of the word *inclosed* in the New York statute; and must be construed in the same sense, as it cannot well bear any other here, and will bear that.

As applied to a single lot, this subdivision may operate to limit the effect of subds. 1 and 2, by making them dependent on the usual course and custom of the adjoining country. For subds. 1 and 2, of themselves, limited only by the general rule of sec. 6, would make cultivation or improvement in the one case, inclosure in the other case, of part of a lot, actual

Pepper and others vs. O'Dowd.

possession of such part and constructive possession of the whole, independent of any course or custom; while subd. 4 gives that effect to such actual possession only when the unimproved or uninclosed part is left so according to the usual course and custom of the adjoining country.

There is no difficulty in determining what a *single lot* of the statute is. It is the smallest legal subdivision of land. *Munro v. Merchant, supra*. Its extent is certain of itself without recourse to any course or custom. And in regard to it, the provisions of sec. 6 and subds. 1 and 2 of sec. 7 seem to have been complete without subd. 4. The latter subdivision, so far as it relates to a single lot, appears only to confuse the statute, otherwise precise and certain. It is apparent that the principal object in framing that subdivision was a *known farm*; and it is to be regretted that the subdivision was not confined exclusively to it.

The farm of the statute is not land intended to be cultivated, but a body of land held for cultivation and cultivated in whole or in part. Burrill's Dict. A farm may be of any size, of any shape, of any boundaries; may include less than one lot, or comprise several lots or parts of lots. And in taking a farm out of the general exception in § 6, and in applying to it in some degree the same rule as to a single lot, the statute substitutes *known* limits according to the course and custom of the country, for the defined limits of a single lot.

As already seen, the purpose of the section is to confine constructive adverse possession to such visible and notorious possession as may fairly imply notice and acquiescence; in other words, to render the extent of constructive adverse possession as certain as its nature will permit. Hence the limitation to the defined boundaries of a single lot. Hence, also, the condition of a farm substituted for a single lot, that it shall be *known*. As the possession is limited to one lot, so it is to one farm, with *known* boundaries to compensate the *defined* boundaries of a lot. And as it is the object of the

Pepper and others vs. O'Dowd.

statute to render adverse possession notorious, so the extent of a farm substituted for a single lot, must be *known*, in the sense of being notorious.

Being so known, when part of it is left uncleared or uninclosed, according to the usual course and custom of the adjoining country, adverse possession of the part actually occupied may extend, by construction, to the part left uncleared or uninclosed according to such course and custom. The course or custom intended is presumed to make the uncleared or uninclosed land a known part of the farm; and the course or custom which operates to extend a notorious adverse possession, must itself be notorious. And thus the limited rule of constructive adverse possession which the statute continues, can never carry it beyond the defined limits of the whole lot or the known limits of the whole farm, of which part is held in actual possession; making constructive possession, as far as may be, as visible, notorious and distinct as the actual possession on which it rests.

All adverse possession must be distinct and continued; notoriously and visibly so. Hare & Wallace, *ubi supra*. And it cannot be enlarged, either as to title or extent, after entry. To constitute adverse possession, entry must be made with defined claim of title and of possession, continued while the statute runs; and, after entry, such claim cannot be enlarged, unless indeed by acts equivalent to a new entry and new claim of adverse possession. Angell's Lim., sec. 384. Entry upon part of a lot, under claim of title to the whole, while other part is held adversely, cannot found adverse possession of the whole lot, though afterwards the adverse possession of the other part be abandoned. And so possession of a known farm cannot be enlarged after entry, to constitute adverse possession founded on such entry by enlarging the boundaries of the farm. Within the statute, the known extent of the farm at the time of entry limits adverse possession under the entry, as surely as the defined extent of a single lot. And, in order

Pepper and others vs. O'Dowd.

to establish adverse possession of a known farm, outside of the actual possession taken, the known extent of the farm at the time of entry must be established. When established, adverse possession founded on the entry can, under no claim or pretense, be suffered to travel beyond that extent. It is the intent of the statute to make the bounds of a known farm as certain, as far as may be, as the bounds of a single lot; and so to make adverse possession of the one as distinct, visible and notorious, as far as possible, as adverse possession of the other.

"The usual course and custom of the adjoining country" is obviously a local custom. If there were, in fact, such a custom applicable to this case, it might and should have been proved by parol. 2 Greenl. Ev., § 250. No proof was given on the subject; but it was, perhaps, hardly competent for the court below to assume that there was no settled custom on the subject. If the assumption were correct, it seems that subd. 4 of sec. 7 should have been excluded from the consideration of the jury, because that subdivision is dependent on such a custom. And it was certainly error to instruct the jury that, in the absence of any settled custom, every farmer should be allowed to judge for himself; that is to say, every farmer should be a custom unto himself.

It appeared in evidence that what are called the Pepper farm and the Miller farm had been, not remotely, possessed and used in severalty, as several farms, by several owners. Both are embraced in some of the respondent's title papers. But that goes no more to make them one farm than to make them one lot. To reduce the two into one known farm, within subd. 4, so as to make the actual adverse possession of the respondent or his grantor of part, constructive adverse possession of the whole, it should have been proved that the two had been joined together in one known farm before the entry on which the respondent claimed, and constituted one known farm at the time of such entry. We understand the charge of the court below, and we think the jury must have understood

Pepper and others vs. O'Dowd.

it, to hold that if the Pepper and Miller farms, after entry, with or without intervening land held by the respondent's grantor under a different title, constituted one known farm, then constructive adverse possession of the whole followed the entry of the respondent's grantor. We need not repeat the reasons why we consider this to be fatal error. And we may be permitted to remark that there is, throughout the charge, an obvious conflict between the certain rule of adverse possession which the statute sanctions, and the loose and indefinite application of the rule sanctioned by the court below; and much that looks very like a reversal of the rule that, under the statute, every presumption is in favor of the true owner. *Wilson v. Henry*, 35 Wis., 241.

How much uninclosed land may be so used for fuel or fencing or both, under subd. 3, as to constitute an actual adverse possession of it, may be a question of some difficulty. Certainly such actual use on one lot cannot carry with it constructive use on another lot, of the same piece of timber. The use is put by the statute as actual possession, subject to the general exception of sec. 6. Land, to come within the subdivision, must be used for the supply of fuel or fencing according to the subdivision, and we are inclined to think, must be held for that use as its sole or principal object, in good faith. The extent of land so used must bear a reasonable proportion to the use; must not be positively greater than is reasonably sufficient for fuel and fencing, in the circumstances of each case. And the use must be distinct, visible, continued and notorious, under claim of title; distinguishable from casual trespass or occasional use. *Austin v. Holt*, 32 Wis., 478. It must be such as to constitute the person using the land for fuel or fencing, the occupant of it, in the words of the subdivision. This question also seems to have been referred, by the court below, very much to the judgment of the occupant, in the absence of fraud or insincerity. We cannot but say that the quantity, several hundred acres, appearing to be

claimed here for this use, looks to us unreasonably out of proportion to the supply of fuel and fencing, in the circumstances proved. "So large a tract of forest would not be within the intendment of this provision." *Munro v. Merchant*. What is a reasonable quantity, in each case, is not altogether for the party as matter of choice, nor altogether for the court as matter of law; but is a question for the jury, under proper limitation and instruction.

We ought not to close this discussion without the remark, that subds. 3 and 4 of sec. 7 are quite independent of each other; and that both cannot support the same possession of the same premises. We do not say that one may not, under any circumstances, hold possession of a farm under subd. 4, and of a separate lot for fuel and fencing under subd. 3. On that point we intimate no opinion. But as there is no confusion in the statute between the two forms of possession, so there can be no confusion of possession in fact under them. And where possession is claimed as of a farm, the claim can receive no aid from subd. 3; where it is claimed as used for the supply of fuel or fencing, the claim can receive no aid from subd. 4. An ambiguous possession, claimed in part under each subdivision and not supported by either alone, is not within the statute, and will go for nothing.

Other matters were discussed at the bar, which we do not deem it necessary to consider. It is apparent from all that has been said, that the judgment of the court below must be reversed, and the cause remanded for a new trial.

By the Court. — So ordered.

Greening vs. Bishop.

GREENING vs. BISHOP.

BILL OF EXCEPTIONS. *Presumption when it is not certified to contain all the evidence.*

In an action for damages alleged to have accrued from defendant's negligence, a nonsuit was refused at the close of plaintiff's evidence, but granted after defendant's evidence was in. The bill of exceptions not being certified to contain all the evidence: *Held*, that the nonsuit must be *presumed* to have been justified by the evidence.

APPEAL from the Circuit Court for *Fond du Lac* County.

This was an action for damages accruing to the plaintiff from the running away of his horses and the breaking of the wagon to which they were attached; the complaint alleging that the horses were frightened by a hog lying in a public highway on which plaintiff was then driving, and that the hog belonged to the defendant and was then and there unlawfully at large through his negligence. The answer was a general denial; but defendant admitted at the trial that the hog in question belonged to him, and "that the damage done to plaintiff was at least \$44.95." The testimony for the plaintiff found in the bill of exceptions tends to show that the accident was caused by the presence of the hog in the highway, and that the animal had been at large nearly twenty-four hours. A nonsuit having been refused at the close of plaintiff's evidence, defendant introduced evidence tending to show that the hog escaped from his premises only a few hours before the accident, and without any negligence on his part. He then moved for a nonsuit upon the grounds, that the evidence did not disclose any cause of action against him, did not show him guilty of any neglect, and did not show the hog in question to be an animal likely to frighten horses of ordinary gentleness. The court granted a judgment of nonsuit, and the plaintiff appealed.

Jennings vs. Lyons.

The bill of exceptions is not certified to contain all the evidence.

The cause was submitted upon the brief of *E. T. Delany*, for the appellant, and that of *Eldredge, Thorpe & Hurley* for the respondent. The questions discussed in these briefs are not passed upon by the court.

PER CURIAM. It appears that when the plaintiff rested, the defendant moved for a nonsuit, which motion was denied. When the defendant closed the case on his side, he renewed the motion, and it was granted. It is claimed that this ruling was erroneous, and that there was sufficient evidence to carry the case to the jury upon the question whether or not the defendant was guilty of negligence in suffering the animal to be at large in the street.

There is no certificate that the bill of exceptions contains all the testimony given on the trial. Consequently we are unable to say that the nonsuit was wrong. In order to reverse the judgment, it must appear that the circuit court erred in granting the nonsuit; in other words, we must have some means of knowing that we have all the evidence before us upon which the court acted. Without a certificate that the bill of exceptions contains all the testimony, we must presume that the nonsuit was right and fully justified by the evidence which was before the court when the motion was granted.

The judgment of the circuit court is therefore affirmed.

JENNINGS VS. LYONS.

CONTRACTS. (1) *When for personal services.* (2-4) *When sickness excuses full performance of entire contract, and permits recovery on a quantum meruit.*

1. Where one hires a man and his wife to live in his family and work for him, this is a contract for their *personal services*.

Jennings vs. Lyons.

2. In general, in case of an *entire* contract, the party claiming under it must show *full performance* on his part; but full performance is excused where rendered impossible by the act of God, or of the law, or of the other party to the contract.
3. Sickness or death is an act of God in such a sense as generally to excuse full performance of an entire contract, and permit a recovery on a *quantum meruit*; but otherwise where the sickness is one which should have been foreseen and provided against by the party in default.
4. Plaintiff contracted to render to defendant the domestic services of himself and wife for one year, at a specified price. Four months and ten days thereafter the wife left the service in anticipation of her confinement; both were then discharged from the service, and the wife was confined four or six weeks thereafter. *Held*, that plaintiff was not excused by such sickness, which he should have foreseen, and cannot recover on a *quantum meruit*.

APPEAL from the Circuit Court for *Fond du Lac* County.

Plaintiff brought this action to recover the value of the services of himself and wife for four months and ten days. The defense was, that the services were rendered under a contract by which plaintiff and his wife were to work for defendant one year from November 17, 1873, he upon the farm and she in the house, for \$300; that it was distinctly understood that defendant's object was to secure plaintiff's services during the spring, summer and fall months, and that he would not employ plaintiff during the winter months except for that reason; and that defendant, without just cause or legal excuse, failed to perform his contract.

The case made by the evidence will sufficiently appear from the opinion. The jury were instructed that if at the time plaintiff and his wife quit working for defendant, the wife was sick and unable to do her part of the work, plaintiff was not bound to a further performance of the contract, and was entitled to recover what the services of himself and wife were worth for the time they actually worked.

The plaintiff had a verdict and judgment; and the defendant appealed.

D. W. C. Priest, for appellant:

Jennings vs. Lyons.

1. The contract was *entire*, and plaintiff could not recover without a full performance, or a legal excuse for nonperformance. *McMillan v. Vanderlip*, 12 Johns., 165; *Beebe v. Johnson*, 19 Wend., 500; *Webb v. Duckingfield*, 13 Johns., 390; *Jennings v. Camp*, id., 94; *Monell v. Burns*, 4 Denio, 121; *Lantry v. Parks*, 8 Cow., 63; *Galvin v. Prentice*, 6 Am. R., 58; 45 N. Y., 162, citing *Smith v. Brady*, 17 N. Y., 173; 20 id., 197; 1 Parsons on Con., 522, note 1; Chitty on Con. (9th Am. ed.), 504; Story on Con., § 972; *Gordon v. Brewster*, 7 Wis., 355. A contract as to acts of third parties is binding though it be difficult of performance; and full performance is a condition precedent to recovery. *Blacksmith v. Fellows*, 3 Seld., 401; *Worsley v. Wood*, 6 Term, 710; *Davidson v. Mure*, 3 Doug., 28; Chitty on Con., 572; 12 N. Y., 99; 1 Duer, 209. Sickness of any but the contracting party will not avail unless the contract contemplates the services of the particular individual; nor will it then avail unless the services to be performed require more than ordinary skill. *Wolfe v. Howes*, 20 N. Y., 197; 21 id., 397; 36 id., 221; 49 id., 552; 17 id., 173; 24 Barb., 174 and 666; *Green v. Gilbert*, 21 Wis., 400. The work to be done by the wife in this case was ordinary housework, that could have been done by any hired girl during the wife's sickness. 2. Sickness, to excuse performance, must, like any other contingency relied on for that purpose (Story on Con., §§ 972-975; Story on Bailm., § 36), be such as in the nature of the case would not be foreseen and provided against; and the sickness of the wife in this case was clearly not of such a character

Thos. W. Spence, for respondent:

The contract was for the joint personal services of the plaintiff and his wife; the compensation agreed upon was for such joint services; and the inability of one to perform would necessitate the giving up of the contract by both. And sickness of the persons bound by the contract to render their personal services, making performance impossible, is a legal

Jennings vs. Lyons.

excuse. *Green v. Gilbert*, 21 Wis., 395; *Wolfe v. Howes*, 20 N. Y., 197. A forfeiture of wages for the services performed should be enforced only where there is a voluntary abandonment of the service, and not where the abandonment is caused by a visitation of Providence. *Fuller v. Brown*, 11 Met., 440.

COLE, J. We have no doubt that the contract was for the personal services of the plaintiff and wife. The counsel for the defendant claimed that the work to be performed by the wife required no peculiar skill, and could have been performed by any ordinary hired girl competent to do housework. But the relations which a domestic servant holds to the family, and the nature of the services to be performed, are such, that the temper, habits, intelligence and character of the person are more regarded than mere ability to do work. Considering the nature of the employment, if ever a contract can be said to call for personal services, it would seem to be in case of a domestic who lives in the family of another. This view commends itself to the judgment and good sense of every one on a moment's reflection, and need not be dwelt upon further.

The question is then presented, whether the sickness of the wife under the circumstances excused performance, if the plaintiff agreed that he and his wife should work one year? Upon that point the court below instructed the jury, that if they should find that the contract was as claimed by the defendant, that the plaintiff and wife were to work for him a year for \$300, yet if the plaintiff quit work because his wife was sick and unable to do her part of the work, this would excuse full performance, and the plaintiff could recover what the services of himself and wife were worth for the time they actually worked. This charge was excepted to on the part of the defendant. The general rule doubtless is, that when a contract is entire, operating as a condition precedent, it is

Jennings vs. Lyons.

necessary for a party to show full performance on his part before he can maintain an action upon it. It would appear like mere affectation to attempt to refer to the elementary writers or adjudged cases where this principle is stated and affirmed. The authorities, however, recognize certain exceptions to the rule, as where performance has been rendered impossible by the act of God, by the act of the law, or by the act of the other party. 2 Chitty on Con., p. 1073; 2 Parsons on Con. (5th ed.), p. 672 et seq.; Story on Bailment, § 36. And where the act to be performed is one which the promisor alone is competent to do, the obligation is discharged if he is prevented by sickness or death from performing it. *Wolfe v. Howes*, 20 N. Y., 197; *Ryan v. Dayton*, 25 Conn., 188; *Fuller v. Brown*, 11 Met., 440; *Knight v. Bean*, 22 Maine, 531; *Lakeman v. Pollard*, 43 id., 463; *Green v. Gilbert*, 21 Wis., 395. In other words, sickness or death is generally regarded as an act of God in such a sense that it excuses the nonperformance, and a recovery is allowed upon a *quantum meruit*. In this case it is insisted that the sickness, or anticipated sickness, of the wife furnished no excuse for the failure to perform the contract, and that the instruction of the court that it did excuse was erroneous. The argument is based on these facts:

It appears that the plaintiff and wife commenced work for the defendant on the 17th of November, 1873, and quit about the 27th of the following March. The reason why the parties left their service was, as stated by the plaintiff himself, that his wife was in a family way — expecting soon to be confined, and as a consequence was unable to work. The plaintiff says that she was actually confined within four or six weeks after she left the defendant's employment. It is argued that the plaintiff was fairly chargeable with a knowledge of the condition of his wife; must be presumed to have known that she was nearly four months advanced in pregnancy; was bound to anticipate her sickness as an inevitable event; and

Keenan vs. Hayden.

should have provided for it in his contract. It is said that it was the plaintiff's own fault under such circumstances to undertake and agree that he and his wife would work for a year, because he must have known that it would be impossible for him to perform his contract, and therefore the case does not come within the reason of the rule that sickness excuses. It is difficult to see any defect in this argument. It is incredible that the plaintiff was ignorant of the condition of his wife when he entered into the contract. He must have known that it would be impossible for her to work at the period of her confinement and for some time thereafter. There seems no reason why he should not be held liable for a breach of his contract, absolute in its terms; "not, in fact, for not doing what cannot be done, but for undertaking and promising to do it." For when performance becomes impossible by reason of contingencies which should have been foreseen and provided against in the contract, the promisor is held answerable. 2 Parsons on Con., 672-3. This principle applies to the facts of this case, if indeed the contract was as claimed by the defendant.

By the Court.—The judgment of the circuit court is reversed, and a new trial ordered.

KEENAN VS. HAYDEN.

EVIDENCE: COURT AND JURY. (1) *When question of scienter to be submitted to the jury in action for injuries from ferocious dog.* (2) *Court not bound to instruct jury as to the effect of one among several facts bearing on the question.*

1. Plaintiff's minor child having been bitten by defendant's dog, there was evidence, in an action for the injury, tending to show that defendant had owned the dog for two years before that time; that it was kept tied some portions of the time; that defendant sometimes took it on the

Keenan vs. Hayden.

street tied with a rope, thus keeping it under his control; that before biting plaintiff's child, it had bitten several persons, mainly children, at different times, and had at divers other times violently attacked many other persons; that it frequently attacked persons walking along the street in the vicinity of the defendant's residence; and that it was a cross dog, and was known and shunned as such by defendant's neighbors. *Held*, that the question of defendant's *knowledge* of the dog's vicious propensities was properly submitted to the jury on this evidence.

2. In such a case, where there are several facts in evidence tending to prove the *scienter*, it is not the duty of the court to instruct the jury what the consequences would have been if *only one* of those facts had been in evidence; and there was no error in this case in refusing to charge that the mere fact of defendant's confining his dog at times would not of itself warrant the jury in finding that it was known by defendant to be vicious.

APPEAL from the County Court of *Milwaukee* County.

Action to recover the expenses incurred by the plaintiff in caring for and curing his minor son of wounds inflicted upon him by the female dog of the defendant. It is averred in the complaint that, before the injuries were inflicted, the defendant had notice of the vicious propensities of his dog, etc., notwithstanding which he suffered her to go at large and do the injury. The answer is a general denial. A motion for a nonsuit for the alleged want of proof of the *scienter* was denied, and the plaintiff had a verdict. A motion for a new trial was also denied, and judgment entered pursuant to the verdict; and the defendant appealed.

Jared Thompson, Jr., for appellant, contended, that there was no evidence to go to the jury, that the defendant, or any member of his family, or any of his employees, had knowledge or notice that his dog was of a ferocious disposition, or accustomed to bite mankind. 1 *Ld. Ray.*, 606; 12 *Mod.*, 332; *Judge v. Cox*, 1 *Starkie*, 285 (2 *E. C. L.*, 392); *Blackman v. Simmons*, 2 *C. & P.*, 138 (14 *E. C. L.*, 243); *Beck v. Dyson*, 4 *Campb.*, 198; *Cook v. Waring*, 3 *Hurl. & Colt.*, 332. The fact that the animal had been tied up, did not tend to prove knowledge by the defendant that she was vicious, and was not evidence to go to the jury on that question. *Jones v. Perry*,

Keenan vs. Hayden.

2 Esp., 482, and the cases above cited. 2. The court erred in submitting to the jury the question of the *scienter*, to be answered by them in a special verdict. Tay. Stats., 1496, § 14; *McMasters v. Mutual Co.*, 25 Wend., 379. 3. The court erred in giving the special instructions asked by the defendant.

John J. Orton, for respondent, contended that there was evidence of notice to the defendant's wife, who was shown to be his agent in running his saloon and boarding house during his absence; and that this was sufficient. 2 Esp., 482; *Applebee v. Percy*, L. R., 9 C. P., 647; *Milliken v. Dehon*, 27 N. Y., 364.

LYON, J. It is conceded that the minor son of the plaintiff was severely bitten by the defendant's dog, and that, if the plaintiff is entitled to recover anything, the damages were assessed at a reasonable sum. The principal question to be determined is, whether there was sufficient testimony tending to show that the defendant knew the vicious propensities of the dog, to justify the court in submitting the question of *scienter* to the jury. Or the question is, rather, whether there was any testimony in the case tending to prove such knowledge by the defendant; for if there was any testimony of that character, the question was properly left to the jury.

The testimony tends to prove that the defendant had owned the dog two years before she bit the plaintiff's son; that she was kept tied some portions of that time; that the defendant sometimes took her on the street tied with a rope; by means of which he kept her under his control; that before she bit the plaintiff's son, she bit several persons, mainly children, at different times, and at various other times violently attacked many other persons; that she frequently attacked persons passing along the street in the vicinity of the defendant's residence; and that she was a cross dog, and was known and shunned as such by the defendant's neighbors. One

Keenan vs. Hayden.

witness testified as follows: "There was not a child in the neighborhood who was not afraid of this dog. She had bitten most of them, and all the neighbors complained about the dog." About three months before the plaintiff's son was bitten, the dog had bitten a boy named Clark; and the mother of the latter testified that she informed the defendant of the fact, but she could not remember whether it was before or after plaintiff's son was bitten.

Much of the foregoing testimony was controverted on the trial, yet the jury may have believed it; and if the same is true, the presumption is very strong that the defendant, and his agents who had charge of the dog when the defendant was absent, must have had some knowledge of the character and conduct of the dog. We think the testimony tended sufficiently in that direction to render the question of *scienter* a proper one for the determination of the jury, and hence, that the motion for a nonsuit was properly denied.

The defendant prayed three instructions to the jury, which the court refused to give. They were to the effect that the mere fact that the defendant confined his dog at times, unaccompanied by proof of other facts and circumstances tending to establish the *scienter*, would not, of itself, warrant the jury in finding such *scienter*, or that the dog was tied because she was vicious. The fact of confining the dog does not stand by itself, but is accompanied by proof of other facts tending to show that the defendant knew the character and conduct of his dog; and certainly it was not the duty of the court to instruct the jury what the consequences would have been had the fact of confining the dog been the only one proved having such tendency. The charge of the court to the jury is a full and fair statement of the law of the case, and no exception to it was taken.

This disposes of all the alleged errors, of sufficient importance to require notice, adversely to the appellant.

By the Court. — Judgment affirmed.

VOL. XXXIX. — 36

Irish vs. Dean.

IRISH vs. DEAN.

CONTRACTS: EVIDENCE. (1, 2) *Rights of parties under contract for supplies, silent as to its duration. Parol evidence inadmissible to limit the time. Reversal of judgment.* (3) *No reversal for error by which appellant was not injured.*

By contract under seal, A. covenanted with B. to sell and deliver to the latter, "milk and cream of good quality and in sufficient quantity for his use in the hotel kept by him and known as the 'Park Hotel;' said milk and cream to be daily furnished and delivered" at specified prices; and B. covenanted to purchase of A., at said prices, "all the milk and cream that he may use in the hotel kept by him, known as the 'Park Hotel,' and to pay for the same at the end of each month, in full." B. had a lease of said hotel for five years from the date of said contract. A little more than a year from that date, he refused to receive any more milk or cream from A., and thenceforth purchased those articles from other persons for use in his said hotel. Upon A.'s claim for damages for breach of such contract, *Held:*

1. That the contract being silent as to its duration, either party might terminate it at pleasure upon reasonable notice; and parol evidence that the contract was for a specific time, was inadmissible.

2. That, as no question of notice was made on the trial, the court should have charged that when B. terminated the contract, he had a legal right to do so.

3. That, although B.'s evidence of a contemporaneous oral agreement that the contract should terminate in one year was improperly admitted, still, as A. was not injured thereby, a verdict against him will not be disturbed.

APPEAL from the Circuit Court for *Dane* County.

Action upon an account which the defendant admitted was correct. The controversy arises upon a counterclaim in the answer, in which it is alleged that on the 1st of August, 1871, the defendant and one Harvey T. Jewett were partners in the farm and dairy business in Dane county, under the name and style of H. T. Jewett & Co., and that before that time the plaintiff had leased the "Park Hotel" in Madison, for five years from August 15th, 1871, and, when the contract herein-

Irish vs. Dean.

after mentioned was made, was engaged in making preparations for opening such hotel for the accommodation of the public. The counterclaim then proceeds as follows :

“ And for the purpose of making provisions to supply himself, in the conduct and management of said hotel business, with milk and cream during the time for which he had so leased the said building and appurtenances, and with the mutual agreement and understanding that the contract hereinafter set forth should be for the period of time for which he had so leased the same, unless the said plaintiff should himself sooner withdraw from the business of conducting said hotel, the said plaintiff on the one part, and the said Jewett and this defendant on the other part, as such partners, and by their said firm name, made and mutually executed, under their hands and seals, and delivered, a written agreement, of which the following is a copy, to wit:

“ ‘ This agreement, made this first day of August, 1871, by and between H. T. Jewett & Co., of Dane county, Wisconsin, party of the first part, and *Mark H. Irish*, of the city of Madison, Wisconsin, party of the second part, witnesseth:

“ ‘ That the said party of the first part, for and in consideration of the covenants and agreements of the party of the second part, to be hereinafter specified, doth hereby promise and agree to sell and deliver to said party of the second part, milk and cream of good quality and in sufficient quantity for his use in the hotel kept by him, and known as the Park Hotel; said milk and cream to be daily furnished and delivered at the following prices, viz: milk at six (6) cents per quart, and cream at twenty (20) cents per quart.

“ ‘ And the said *Mark H. Irish*, party of the second part, for and in consideration of the covenants and agreements herein contained to be kept and performed by the said party of the first part, hereby covenants and agrees to purchase of said H. T. Jewett & Co. all the milk and cream, at the prices hereinbefore named, that he may use in the hotel kept by him,

Irish vs. Dean.

known as the Park Hotel, and to pay for the same at the end of each month, in full.

“ ‘Witness our hands and seals the day and year first above written.

“ ‘H. T. JEWETT & Co. [Seal.]

“ ‘M. H. IRISH. [Seal.]’ ”

It is then alleged that Jewett & Co. purchased additional stock and incurred other large outlays in adding to their facilities for performing such contract, and did perform it fully from August 23d, 1871 (when the hotel was first opened for guests), until September 2d, 1872, on which last mentioned day the plaintiff refused to purchase or receive any more milk or cream from Jewett & Co., although they were ready and willing and offered to furnish the same, but the plaintiff procured milk and cream elsewhere for use in his hotel. An assignment of the contract, and all rights under it, to the defendant, before this action was commenced, is duly averred, and the counterclaim is for damages resulting from the alleged breach of the contract by the plaintiff. The quantity of milk and cream furnished under the contract is stated as a basis for ascertaining such damages.

The plaintiff interposed a reply to such counterclaim, in which, after denying that the contract was to remain in force more than one year, he alleged certain reasons, not material to the questions considered by the court, why he refused to receive milk and cream under the contract after the expiration of the year.

On the trial, parol evidence was received on behalf of the defendant, showing the leasing of the Park Hotel by the plaintiff, as alleged in the counterclaim, and that when the contract in controversy was made, the defendant knew the terms of the lease. Parol evidence was also received, against the objection of the defendant, tending to show that the parties agreed that the contract should terminate in one year. After such objection was overruled, the defendant gave testimony tending to prove that the contract was to continue while

Irish vs. Dean.

the plaintiff should keep the hotel. All the foregoing evidence was submitted to the jury, who found specially that the contract was for one year. The defendant was, therefore, defeated on his counterclaim, and the plaintiff had verdict and judgment for the amount admitted to be due on his account. From this judgment the defendant appealed.

Wm. F. Vilas, for appellant, contended, 1. That the court should have construed the written contract, without reference to any earlier or contemporaneous agreement not incorporated therein. 2 *Parsons on Con.* (5th ed.), part II, ch. 1, sec. 10, p. 548. 2. That this contract ought not to be construed as an idle document, silent as to time, and terminable at the caprice of either party. A contract is to be so construed "*ut res magis valeat quam pereat.*" *Brown v. Batchelor*, 1 H. & N., 255; *Mare v. Charles*, 5 E. & B., 978. "For the same reason, all parts of the contract will be construed in such a way as to give force and validity to all of them, and to all the language used, where that is possible." 2 *Parsons on Con.*, part II, ch. 1, sec. 3, p. 505; *Goiz v. Low*, 1 Johns. Cas., 343. Again, the presumption in respect to the use of words is in favor of the comprehensive over the restrictive, the general over the particular sense. 2 *Parsons on Con.*, p. 501. The situation of the parties at the time with respect to the subject of the contract, the surrounding circumstances, and the manifest object and purposes to be subserved by it, as derived therefrom, are also confessedly admissible to aid in arriving at the sense in which the words of the contract were employed. Reading this contract in the light of the fact that the plaintiff, when he entered into it, was engaged in making arrangements to supply the "Park Hotel," then recently leased by him for five years, counsel contended that it could only be construed to mean, that the plaintiff was to receive from the other party to the contract all the milk and cream that he might use in such hotel; and that the obligation of the contract would therefore continue so long, and only so long, as plaintiff

Irish vs. Dean.

should desire such supplies, as the landlord of the said hotel; that proof of the fact that he was lessee for a limited time, should be resorted to chiefly for the purpose of limiting the obligation to that time as its utmost; but that the language of the contract would terminate its obligation, should the plaintiff sooner assign or surrender the lease or discontinue business.

S. U. Pinney, for respondent:

1. Where the writing is *silent* on a subject upon which the parties have actually agreed as part of their contract, parol evidence is admissible to show what the agreement was in that respect; the agreement in such case being in part a written, and in part an oral one. 2 Parsons on Con., 553; *Jeffery v. Walton*, 1 Starkie, 267; *Ballston Spa Bank v. Marine Bank*, 16 Wis., 120, 136. When a contract does not depend solely upon written documents, the question as to what such contract was, is for the jury. 1 Chitty on Con., 102; *Moore v. Garwood*, 4 Exch., 681, 690; *Edwards v. Goldsmith*, 16 Pa. St., 43; *Bomeisler v. Dobson*, 5 Whart., 398.

2. The writing here is entirely silent as to the time during which it should be in force. The engagement of *Irish* to "pay for all the milk and cream that he may use" in the hotel, refers to the engagement of the other party to sell and deliver, and does not bind him to receive and pay except so far as they have bound themselves to deliver (1 Chitty on Con., 122, 117, and cases cited in note); and their engagement extended only to daily delivery, good quality and sufficient quantity; the object of the parties being to covenant for a *full supply and good quality so long as it was delivered*, and that neither party should have to look elsewhere, the one to get an adequate supply, or the other to market that quantity. If the contract contains any provision as to its duration, it is that it shall continue as long as the plaintiff shall keep the hotel, whether as lessee or owner. If such a provision exists in the contract, parol evidence, to show that it was to con-

tinue only as long as he should keep as lessee, or, at most, no more than five years, could not be received to affect the contract. It could only be admitted upon the theory that the contract is, as we contend, entirely silent as to the period of its duration. 3. The written contract did not contain any reference to the lease from the Park Hotel company to the plaintiff. Other contemporaneous agreements between the same parties, in relation to the same subject matter, in whole or in part, might be referred to as part of the agreement, or to construe it. So, reference might be had to writings not contemporaneous, and not between the same parties, *if the agreement itself made such reference*; otherwise not. *Posey v. Rice*, 29 Wis., 93; *Hutchinson v. R'y Co.*, 37 id., 582, 608.

LYON, J. We think the circuit court erred in admitting testimony *aliunde* the written contract, to show the time the parties agreed the contract should remain in force. That must be ascertained and determined by the court from the contract itself, without resort to extraneous evidence; and the jury had no concern with the question. This is not the case of latent ambiguity in a written contract, which may be explained by parol; neither is it a case in which the parties have reduced to writing a part of their contract only, leaving the residue thereof in parol. On the contrary, in this case the parties have reduced the whole of their contract to writing, and the instrument seems free from ambiguity. There is no more difficulty in determining, from the instrument itself, how long the contract might continue, and when and how it might be terminated, than there is in determining when a promissory note becomes due which specifies no day of payment, or how a written contract to render and pay for daily or weekly services, but which is silent as to duration, may be terminated. In the one case it would be held that the note was due immediately, and parol testimony would not be received to show the contrary. *Thompson v. Ketcham*, 8 Johns.,

Pierce vs. Kelly, impleaded.

190. In the other case, it would, doubtless, be held, that the contract is terminable by either party at pleasure, and parol proof would not be received of an agreement that the services should be continued to a specific time. The most that could be required of the party seeking to terminate the contract, would be reasonable notice thereof to the other party.

The true rule, we think, is this: In a contract for personal services, or for the sale of personal property to be delivered from time to time, if the contract is silent as to its duration, either party may terminate it at pleasure by giving reasonable notice to the other party of his intention to terminate it. The present case comes within this rule, and the circuit court should have excluded the proofs *aliunde* the written contract, which tended to show that the contract, although silent as to duration, was yet for a specific time. Such proofs changed the terms of the contract just as certainly as though it had been expressly written therein that either party to it might terminate it at his option. Inasmuch as no question of reasonable notice was made on the trial, the circuit court should have held that when the plaintiff terminated the contract, he had a legal right to do so, and could not be required to respond in damages therefor.

It follows that the defendant was not injured by any errors committed on the trial, and hence, that the judgment of the circuit court must be affirmed.

By the Court. — Judgment affirmed.

PIERCE VS. KELLY, imp.

PRACTICE IN SUPREME COURT. *Rehearing. When this court loses appellate jurisdiction of a cause.*

1. Under sec. 7, ch. 264 of 1860, this court loses jurisdiction of appeals in thirty days after judgment on them here, unless the jurisdiction is re-

Pierce vs. Kelly, impleaded.

tained by order of the court for the purpose of a motion for rehearing, made within that time (*Pringle v. Dunn*, ante, p. 435); and this applies where the judgment here is one dismissing the appeal for noncompliance with the rules.

2. Where a motion for a rehearing is made after this court has lost jurisdiction of the action, it cannot entertain the motion, nor deny it with costs; and in such a case it denies the motion without costs.

APPEAL from the Circuit Court for *Racine* County.

This case was submitted on the record, printed case and briefs, on the 3d of March, 1876; and on the 21st of the same month the court made an order dismissing the appeal, "because the printed case is materially defective and fails to comply with the rule." On the 13th of April following, the appellant's attorneys served on those of the respondent notice of a motion to be made on the 18th of that month, or as soon thereafter as they could be heard (based on an affidavit annexed to the notice and the papers filed in the cause) for an order reinstating the cause upon the calendar, and for leave to perfect the printed case, etc. The annexed affidavit of one of the appellant's attorneys stated facts to explain and excuse the defects of the printed case, and also stated that the appellant had a good and substantial defense on the merits, etc. While the motion to reinstate was pending, one of the justices of this court, upon the further affidavit of appellant's attorney, directed an order to be entered, retaining the record until the motion should be disposed of; and on the 18th of April, the respondent's attorneys stipulated that such motion might be heard on the next motion day of this court, and that the record be retained here until the motion was disposed of.

The motion was submitted on the 28th of April, and the following opinion was filed on the 23d of May:

PER CURIAM. This motion comes too late. In *Pringle v. Dunn*, ante, p. 435, it was held that under sec. 7, ch. 264 of 1860, this court loses jurisdiction of appeals in thirty days after

Russell and another vs. Lennon.

judgment on them here, unless the jurisdiction is retained by order of the court for the purpose of a motion for rehearing, made within that time. The statute makes no other exception, and the court has no power to add others to the statute. And in cases of dismissal for noncompliance with the rules, the judgment of dismissal is a judgment on the appeal within the meaning of the statute. *Estey v. Sheckler*, 36 Wis., 434. No stipulation of the parties, and no order except on a motion and for the purpose of rehearing, is of any avail, under the statute, to retain the appeal here or to prolong the jurisdiction of the court over it.

Thirty days after the dismissal in this case had elapsed before this motion was made. And the court had lost jurisdiction to entertain the motion, or to deny it with costs.

The motion is therefore denied, without costs.

RUSSELL and another vs. LENNON.*Exemption from execution against partnership property.*

1. Where an execution for a partnership debt is levied upon goods of the firm, the partners may sever their interest, and each may then claim his exemption in his separate part. *Newton v. Howe*, 29 Wis., 531.
2. But under the constitution and laws of this state, exemption of property from execution is a *personal privilege of the individual debtor*, and there is no exemption in favor of partners jointly. *Gilman v. Williams*, 7 Wis., 329, as to this point, overruled.
3. In case, therefore, of a levy upon goods of a firm for a partnership debt, the partners cannot maintain a joint action to recover the property as exempt.

COLE, J., dissents.

APPEAL from the Circuit Court for *Outagamie* County.

The plaintiffs were partners doing business in the city of Appleton as tinnerns and jobbers. The defendant, as sheriff, on

the 2d of November, 1874, levied on the partnership property of the plaintiffs then in their store, consisting of tools and stock in trade, under an execution to satisfy a judgment against the plaintiffs for about \$235. The plaintiffs thereupon selected tools and stock in trade to the estimated value, as defendant alleges, of \$200, which the defendant then surrendered to them. Afterwards, while the remaining property so levied upon was still in defendant's possession, the plaintiffs made a demand upon him in writing, as follows: "We the undersigned, each for himself, demands as a personal right, his interest in the following schedule of property, as exempt from levy or sale on execution, and that you set the same apart and return the same to us in the same condition it was seized in by you." Here followed an enumeration of all the articles levied upon. Defendant refused to return them, and thereupon this action was brought for their recovery with damages for their detention. The court found the value of the property in dispute to be \$257.65, and the value of that surrendered to plaintiffs to be \$135.00; and it held that the whole of said property was exempt from execution, and rendered judgment for the plaintiffs as demanded. Defendant appealed from the judgment.

The cause was submitted for the appellant on the brief of *Warner, Ryan & Allen*, who contended, among other things, 1. That a copartnership, whatever may be the number of persons composing it, is entitled to only one exemption, to the same extent as an individual. *Gilman v. Williams*, 7 Wis., 329; *In re Handling & Venney*, Cent. L. J., April 23, 1875, per DILLON, J.; *Pond v. Kimball*, 101 Mass., 105; *Guptil v. McFee*, 9 Kans., 30; *In re Blodgett*, 10 Bank. Reg., 147; *In re Price*, 6 id., 400; *Amphlet v. Hibbard*, 29 Mich., 298; *Wright v. Pratt*, 31 Wis., 99. A copartnership is in law one person or one body, and is entitled as such to but one exemption, and can claim no greater exemption than an individual. 2. That plaintiffs cannot assert in

Russell and another vs. Lennon.

an action brought by them jointly, a right claimed by each individually as a personal right.

Gerrit T. Thorn, for respondents, argued, that the statutes relating to exemptions are to be liberally construed, and when several debtors are jointly interested in exempt property, that fact cannot properly abridge the right of each individual debtor under the statute. This court has held that joint tenants are entitled to their right of exemption (*Newton v. Howe*, 29 Wis., 531), has referred with apparent approval to *Stewart v. Brown*, 37 N. Y., 350, where it was held by all the judges that the provisions of the exemption act extend to property owned by the debtor as a member of the partnership; and has also held that tenants in common can maintain a joint action for exempt property. *Gilman v. Williams*, 7 Wis., 329. The proposition that a copartnership in the eye of the law is as one person or body, and only entitled to the exemption for one, is not tenable under the rule in *Newton v. Howe*. In all their other social rights and interests, copartners are treated as individuals; why then should there be an exception in the matter of exemptions? The rule of law which creates such an exception is based upon a technical construction, subversive of the purposes of the statute, and blind to the "cardinal rule in the interpretation of such statutes, that they are to be liberally construed in order to promote the object of their enactment." *Kuntz v. Kinney*, 33 Wis., 514. In *West v. Ward*, 26 Wis., 579, it was merely held that an undivided interest in real estate is not as such susceptible of an ownership or occupancy such as the law contemplates in order to constitute a homestead; because the statute requires the homestead to be a specific portion of land capable of being "set apart by metes and bounds," and thus separated from what is not exempt. In *Wright v. Pratt*, 31 Wis., 99, where one of the joint owners of a horse, buggy and harness, claimed that his third part was exempt, the court held that it was not exempt, because the property was *incapable of division*, and there

Russell and another vs. Lennon.

could be no right of exclusive possession in one of the owners. In the case at bar, the property was *capable of division*, though the parties, as in *Gilman v. Williams*, did not desire to divide it. Counsel further cited in support of the judgment of the court below, *Hoyt v. Van Alstyne*, 15 Barb., 568; *Radcliff v. Wood*, 25 id., 52; *Servanti v. Lusk*, 43 Cal., 238; *In re Richardson*, 7 Ch. Leg. News, 62 (November 14, 1874); *Howard v. Jones* (Sup. Ct. Ala.), 13 Am. Law Reg., N. S., 457; *In re Young*, 3 Nat. Bank. Reg., 111; *In re Rupp*, 4 id., 25.

RYAN, C. J. There appears to be no doubt that if the respondents had held the property claimed in this action, in equal moieties in severalty, they would have been entitled to hold each his share, as his exemption under the statute. And, upon the levy of the execution on the partnership property, they had a right to sever their interest in it; and each might thereupon have claimed his exemption in his separate part. *Newton v. Howe*, 29 Wis., 531. The difficulty in the way of the respondents in this case is not in their individual rights under the statute, but in their failure properly to assert them.

The principle of all exemption laws in this state is very clearly expressed in the constitution itself. "The privilege of the debtor to enjoy the necessary comforts of life should be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale," etc. This principle makes all constitutional exemption a personal privilege of each debtor, secured to him individually, not in mere benevolence only, but also in the interest of the state in the personal well being of each of its citizens. *Maxwell v. Reed*, 7 Wis., 582; *Bull v. Conroe*, 13 id., 233. And the statutes of exemption appear to be framed on this principle. They go to secure the necessary comforts of life to families by exemption to heads of families; and the letter and spirit of exemptions follow the constitutional principle, in securing a personal privilege to each

Russell and another vs. Lennon.

debtor individually. There may be joint debtors, but our constitution and statutes sanction no joint exemption. The exemption "applies to the debtor in the singular number, and is personal and individual only." *Pond v. Kimball*, 101 Mass., 105.

We are aware that there are several cases to be found, chiefly in the federal bankrupt courts, sustaining exemptions to partnerships as such. But we cannot think that these cases rest on sound principle. We have already seen that the principle of exemption and the provisions of the statute are personal. And the difficulties suggested by the supreme court of Massachusetts in the way of partnership exemptions seem to be insuperable. *Pond v. Kimball*, *supra*. We have no doubt, that, in proper cases, each member of a partnership is entitled to his separate exemption out of the partnership property; and that the partnership property, after levy, may be severed by the partners; so that each partner may have his several exemption. But it seems to us to be as indefensible to extend the personal privilege of exemption to a partnership, as such, as to extend it to a corporation aggregate. In the language of the Massachusetts court: "The exemption, in our opinion, is several and not joint; . . . is personal and individual only."

It is true that the judgment in this case is supported by *Gilman v. Williams*, 7 Wis., 329. That case indeed went upon the exemption of one to a partnership of two. But as the one exemption was in the personal right of one of the partners, the rule would support two exemptions as well as one. But we feel constrained to hold that case to be, so far, in violation of correct principle. It was no doubt a great temptation in that case, as it has been in this, to support an exemption which might have been, but was not, properly asserted; to make the judgment, "to do a great right, do a little wrong." But the view of the learned judge who delivered the judgment in that case is clearly erroneous. He reasons that either of the two partners might have held the whole property

Russell and another vs. Lennon.

exempt; that each might therefore hold a moiety of it exempt; and that so the joint suit by both partners for the whole could be sustained. He appears to have overlooked the elementary principle that several rights of several persons cannot be asserted in a joint action at law by all; that partners can maintain an action as such for partnership rights only. The truth appears to be that this question was very much disregarded in view of others in that case, then deemed of much greater moment.

The rule in *Gilman v. Williams* does not appear to have been since considered in this court, though there are cases which seem to be somewhat in conflict with it. *West v. Ward*, 26 Wis., 579; *Wright v. Pratt*, 31 id., 99. And we therefore feel at liberty, though with great reluctance, to overrule a case wrongly decided so long ago, and not since affirmed.

We are not unmindful of the beneficent character of statutes of exemption, or of our duty to construe them liberally in favor of their object. *Kuntz v. Kinney*, 33 Wis., 510; *Jarvais v. Moe*, 38 id., 440. But we must administer them according to their letter and spirit, as well as the settled principles and established forms of legal proceedings. We reverse this judgment with great reluctance, especially because the respondents seem to have been misled by *Gilman v. Williams*.

COLE, J. I am disposed to adhere to the rule of *Gilman v. Williams*, which was long since decided, and which gives the partnership the benefit of one exemption. That decision is supported by the case of *Stewart v. Brown*, 37 N. Y., 350. If the question were a new one in this state, I might conclude to hold with my brethren. As it is, I am constrained to dissent.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to the court below to dismiss the complaint.

Grootemaat vs. Tebel.

GROOTEMAAT VS. TEBEL.

VACATING JUDGMENT. *Defendant's neglect held not excusable.*

Defendant testifies that he gave the summons served on him herein to his attorney to defend the action, while the attorney testifies that defendant did not deliver to him such summons, but gave him to understand that none had been served. It appears, however, that defendant paid no attention to the action for some eighteen months, until served with an order to show cause why judgment should not be rendered against him; that he then gave such order to his attorney to attend to it; but neither he nor his attorney paid any further attention to the subject until execution had issued. *Held*, that the court below did not abuse its discretion in refusing to set aside the judgment; the defendant's neglect not being excusable.

APPEAL from the Circuit Court for *Milwaukee* County.

This action was to enforce the collection of a mechanic's lien, and was commenced on the 19th of September, 1872, by service of the summons upon the defendant. The complaint was filed October 29, 1872, and judgment as upon default was entered on the 8th of March, 1875, after the service of an order to show cause why it should not be so entered. On the 31st of May following, the court, after a hearing, denied a motion of the defendant to vacate the judgment and grant him leave to answer; and from this order the defendant appealed.

The papers read at the hearing of defendant's motion included the proposed answer, duly verified, and an affidavit of merits. The essential facts upon which the order was based. will sufficiently appear from the opinion.

The case was submitted on briefs.

James Hickcox, for appellant.

Nath. Pereles & Son, for respondent, with *Rogers & Hover*, of counsel.

RYAN, C. J. The circuit court has discretion to relieve a defendant from a judgment, within a year after notice of it,

going against him through his mistake, inadvertence, surprise, or excusable neglect. Ch. 125, sec. 38, R. S. The motion papers in this case disclose no pretense of mistake, inadvertence or surprise. They do disclose neglect, which we cannot but consider gross and inexcusable.

Whether the appellant gave the summons served upon him to his attorney to defend the action, as he states, or did not, giving him to understand that none had been served, as the attorney states; it appears to be certain that the appellant paid no attention to the action for some eighteen months, until the order to show cause why judgment should not be rendered against him was served upon him. He then gave the order to his attorney to attend to it; and seems to have paid no further attention to the subject, until execution had issued. And his attorney seems to have followed his example. The affidavit of the respondent's attorney shows that he forbore entering judgment for a long time, and took great pains to avoid the necessity. When he did finally apply for judgment, the court below made an order on the appellant to show cause why judgment should not go against him, and withheld judgment until the order had been served. It is difficult to understand what more the respondent or the court below could have done to incite the appellant to diligence. The failure of the appellant's attorney to defend, after the order to show cause, seems to have rested in some discretion confided to him; but, in any case, could not excuse such persevering and repeated neglect of the appellant himself.

"Such long, passive inattention and indifference are surely neglect, but it would be difficult to consider it excusable. *Non dormientibus jura subserviunt*. The statute was not designed to license mere apathy in suitors." *Pringle v. Dunn*, ante, p. 439.

We can see no abuse of the discretion of the court below in denying the motion, to warrant us in reversing its decision.

By the Court. — The order of the court below is affirmed.

VOL. XXXIX. — 37

Merriam vs. Field.

MERRIAM VS. FIELD.

- (1) *Sale of goods: implied warranty.* (2) *Error in instructions not cured.*
(3) *Exceptions filed after trial. Act of 1874.*

1. Where lumber is sold without opportunity for examination by the vendee, there is an *implied warranty* that it is merchantable; and where there was evidence tending to show a sale under such circumstances, it was error to instruct the jury, in effect, that the vendee could not recover for any defect in the quality unless they should find that the vendor made representations which would amount to an *express warranty*.
2. Such error was not cured by the fact that there was also evidence tending to show that the vendee took with full knowledge of the quality; it not appearing whether the jury found against him on that ground, or on the ground that there was no express warranty.
3. The bill of exceptions bears date March 9, 1875, and the exceptions to the judge's charge, incorporated therein, appear not to have been filed until March 22d, after a motion on the judge's minutes for a new trial had been denied, but before the close of the term. The record states that when the motion for a new trial was argued, the reporter's minutes of the charge had not been written out, and no copy was in the possession of appellant's attorney. *Held*, that the exceptions were in time to enable this court to review them under sec. 2, ch. 194, Laws of 1874.

APPEAL from the Circuit Court for *Milwaukee* County.

The complaint alleges that on the 21st of June, 1859, at Quincy, in the state of Illinois, the defendant bargained and sold and agreed to deliver to the plaintiff, at the place and on the day above mentioned, 750,000 feet of good merchantable pine lumber, at a certain agreed price; that the plaintiff then and there paid defendant the sum agreed upon for said quantity of lumber; that the defendant did not deliver the agreed quantity, but failed to deliver, and has ever since, on demand, refused to deliver, 124,058 feet thereof; and that of the amount delivered, about 9,000 feet was not good merchantable pine lumber, but was culls. The damages on the culls are laid at \$600, and on the shortage at \$1,758; and judgment is demanded for the aggregate sum of \$2,358, with interest from June 21, 1859, etc.

Merriam vs. Field.

The answer, after a general denial, alleged that on said 21st of June, 1859, it was agreed between the parties that defendant should deliver to plaintiff 750,000 feet of pine lumber, to be delivered in the raft in the Mississippi river at Quincy, Illinois, and to be taken at an estimate or calculation of the quantity made by the parties; that the parties estimated and agreed upon the number of rafts and pieces of rafts required to make up the quantity aforesaid; and that the 750,000 feet so estimated were delivered by defendant to plaintiff at the time and place and in the manner aforesaid, and were by plaintiff received in full settlement and satisfaction of all agreements between the parties.

A bill of sale executed by the defendant to the plaintiff on occasion of the transaction at Quincy referred to in the pleadings, was put in evidence, and, omitting dates, signatures, and other formal parts, was in these words: "Know all men by these presents, that I, *Burgess P. Field*, . . . in consideration of amount of lumber agreed on, being seven hundred and fifty thousand feet, warranted free from any incumbrance and against any adverse claims, and sell and convey to *D. D. Merriam*, having received payment in full for the same."

Decisions of this court on two former appeals in this action will be found reported in 24 Wis., 640-644, and 29 id., 593-599.

The evidence on the second trial was very voluminous, but no part of it need be stated here. Certain portions of the judge's charge to the jury, excepted to by the plaintiff, are sufficiently set forth in the opinion.

Verdict for the defendant. A motion by the plaintiff for a new trial, based on the judge's minutes, on the ground that the verdict was contrary to the law and evidence, was heard on the 8th of March, and was denied. Afterwards, on the 22d of March, plaintiff filed exceptions to the charge and to the denial of certain instructions asked by him; and he appealed from a judgment on the verdict.

Merriam vs. Field.

H. M. Finch, for the appellant, contended, among other things, that the charge of the court was erroneous, 1. Because the word "lumber" in the contract was an express contract that the articles delivered should be merchantable. *Henshaw v. Robins*, 9 Met., 83; *Hastings v. Lovering*, 2 Pick., 214; *Osgood v. Lewis*, 2 Harris & Gill, 495; *R. T. & Man. Co. v. Farquar*, 8 Blackf., 89; *Shepherd v. Kain*, 5 Barn. & Ald., 240; *Bannerman v. White*, 10 C. B., N. S., 844; *Nichol v. Godts*, 10 Exch., 191; *Chanter v. Hopkins*, 4 M. & W., 401; *Josling v. Kingsford*, 106 E. C. L., 447; 3 Rawle, 23. 2. Because the judge entirely misstated the former decision of this court, which was, that, under the contract, if the lumber was in the water where it could not be inspected, that fact of itself made it defendant's duty to deliver merchantable lumber. 3. Because it is now well settled that an express warranty against a specified defect will be valid, although the purchaser had actual knowledge of such defect. *Pinney v. Andrus*, 41 Vt., 631; Smith's L. C., vol. 1, part I, 342.

D. S. Ordway, for respondent:

We admitted at the trial that, upon the fact that the lumber at the time of sale was in the water where it could not be inspected, there was an *implied warranty* of its merchantable character, as this court had already decided; but we contended and introduced proof that plaintiff had examined the lumber and knew all about its quality *before its arrival at Quincy*, and agreed to receive and did receive it as it was, without warranty. That was our main ground of defense; the question of fact was fairly submitted to the jury; and if our position was correct in law, the verdict should stand. In proof of its correctness we cite: 2 Story on Con., § 334 and note 1; Benjamin on Sales (1st Am. ed.), 560 and notes; 1 Parsons on Con. (5th ed.), 584, note (s); *Wright v. Hart*, 18 Wend., 456; *Gardner v. Gray*, 4 Campb., 144; *Whitefield v. McLeod*, 2 Bay, 380. 2. The exceptions to the charge were made too late. Sec. 2, ch. 194, Laws of 1874, provides that exceptions

Merriam vs. Field.

to the charge may be taken at any time before the close of the trial term, and may be incorporated in the bill of exceptions, *and reviewed, the same as if made before the jury retires.* This act, obviously unwise and tending to obstruct the course of justice, should not be so construed as to accomplish all the mischief possible; and the clause last recited should not be understood as referring to a review by this court only, but also to a *review by the circuit judge.* Exceptions taken before the jury retires can be reviewed by the circuit judge upon motion for a new trial, and are ordinarily so reviewed. We insist that exceptions taken under this act after verdict must be made before the argument of a motion for a new trial, made upon the minutes of the court, and that the making and arguing of such a motion (as in this case) precludes subsequent exceptions to the charge, being an implied admission that no cause of complaint, as to the charge, exists.

[Counsel on both sides discussed at length other questions raised by the record.]

COLE, J. A number of exceptions were taken on the trial to the rulings of the court admitting or excluding evidence. They will not be noticed, for the reason that we are satisfied that the charge of the court was calculated to prejudice the plaintiff, and that therefore there must be a new trial on that ground.

Among other things the learned circuit judge stated in substance to the jury, that from the bill of sale itself the law would imply a warranty that the lumber should be of a merchantable quality and of the kind set forth in the contract. But he observed that the supreme court had said upon these important questions there should be evidence taken to find out what the parties meant at the time of the sale, and that he left it to the jury to say what was the contract with reference to this matter. In another part of the charge the circuit judge further stated or directed the jury, that if they should

Merriam vs. Field.

find from the evidence that the defendant did warrant or guaranty the quantity to be 750 M. feet, and did warrant it to be of good, merchantable quality, free from culls, and should also find that there had been an honest measurement of the lumber, and it fell short, then the plaintiff was entitled to recover for the shortage; and that if the quality was not such as represented, the plaintiff was entitled to recover whatever would be a proper deduction for the lumber that was not merchantable; that, on the other hand, if the jury should find there was no such warranty as to quality and as to amount, then the plaintiff could not recover for the shortage; and that it was a question for them to decide upon the evidence, whether there were any such representation as to the quality and quantity, and whether there had been any failure in the quantity or quality.

The natural effect of this charge was, that the defendant was not answerable unless he expressly warranted the lumber to be merchantable. It will be seen that the court submitted the question whether there were any representations made by the defendant in regard to the quality of the lumber, and directed the jury that if they should find that such representations were made, then the plaintiff would be entitled to recover whatever would be a proper reduction for lumber which was not merchantable. It is obvious that under this charge the jury might have found for the defendant on the ground that he made no representations as to quality when he sold the lumber. Indeed, the charge is only susceptible of the construction that, in order to recover for a defect in quality, it was essential for the plaintiff to show that the defendant expressly warranted the lumber to be of a merchantable quality. The liability of the defendant is clearly placed upon that ground.

The circuit court seems to have misapprehended the effect of the decisions of this court heretofore made in the cause. When the case was first here, as reported in 24 Wis., 640, this

Merriam vs. Field.

court held that as the bill of sale contained an express warranty of title and against incumbrances, with no warranty that the lumber was merchantable, the presumption was that the writing expressed the whole contract as to express warranties; and that the plaintiff could not show that the vendor at the time of sale represented the lumber to be merchantable, without a violation of the salutary rule against varying and adding to written contracts by parol evidence. But this court likewise held that, inasmuch as the testimony tended to show that the lumber, when the bill of sale was executed, was in rafts in the Mississippi river at Quincy, Ill., where it could not be inspected by the vendee, if the sale was made under such circumstances, there was an *implied* warranty that the lumber was merchantable. When the case was here on the second appeal (29 Wis., 592), Mr. Justice LYON properly remarked, in the opinion then given, that this proposition was *res adjudicata* in the cause, and was no longer open for controversy. It seems unnecessary to remark upon the distinction between a warranty of quality which the law implies in case of a sale of lumber situated beyond the reach of the vendee's examination and inspection, and an express warranty of quality made by the vendor. The two things are confounded in the charge, or rather the court ruled that the defendant was not liable unless the jury found that he made representations as to quality which would amount to an express warranty. And consequently there was manifest error in the court's holding, as it did hold, that if the lumber, when the bill of sale was executed, was in the water where it could not be inspected, it was a question for the jury to determine from the evidence, whether there was a warranty of quality.

Nor is it any answer to say that the error became immaterial because it appeared that the plaintiff, knowing what the lumber was, both as to its quality and quantity, took it by agreement as it was, in full satisfaction of the previous contract. It would be improper for us to express an opinion as

Merriam vs. Field.

to the effect of the evidence upon that question; and we shall refrain from doing so, except to remark that it is very far from being of so satisfactory a character as to render the error in the charge, which we have been commenting on, immaterial or harmless. True, in immediate connection the court told the jury that if they were satisfied from the evidence that the plaintiff had ample opportunity to see the lumber before it was rafted, and knew its quality, had examined it and was able to judge as to quantity and quality, they might find that he purchased the lumber knowing what it was. Assuming, as we may for the argument, but not deciding the point, that there was evidence sufficient to carry that question to the jury, still it is impossible to tell whether the jury found for the defendant upon that issue or because there was no express warranty of quality established by the evidence.

In regard to the claim for shortage, but an observation need be made. On the second appeal, this court held the contract ambiguous as to quantity. It was there said, whether the bill of sale called for 750 M. feet of lumber absolutely, or whether it was agreed between the parties that the rafts should be delivered and accepted for whatever lumber they contained — no specified quantity being fixed or contracted for, — were questions for the jury to determine from all the facts and circumstances. If the contract was for the sale and delivery of 750 M. feet, and the defendant failed to deliver the entire quantity, he would be bound to make good the shortage.

In this case the exceptions to the charge of the court are incorporated in the bill of exceptions, which bears date March 9, 1875; but the exceptions do not appear to have been filed until March 22d, after a motion for a new trial, made upon the minutes of the judge, had been overruled. The counsel for the defendant insists that the exceptions must be disregarded, because too late. Sec. 2, ch. 194, Laws of 1874, provides that in actions thereafter tried, either party may, at any time before the close of the term of court at which the action

 Power vs. Rockwell.

is tried, except to any part of the judge's charge to the jury, and such exceptions may be incorporated into the bill of exceptions and reviewed, the same as if made before the jury retires. There is no pretense that the exceptions in the present case were not filed before the close of the term, and it is stated in the bill of exceptions that at the time of the argument of the motion for a new trial, the reporter's minutes of the charge had not been written out, and no copy was in the possession of the attorney of the plaintiff. But the exceptions were filed in time to enable this court to review them. This is surely so if any effect is given to the above provision. The practice there sanctioned may be most pernicious, as we are inclined to think it is; but it is impossible to say it was beyond the power of the legislature to authorize it.

By the Court.—The judgment of the circuit court is reversed, and a new trial ordered.

 POWER VS. ROCKWELL.

JUDGMENT: PRESUMPTION: COSTS. (1, 4) *Presumptions to sustain judgment for costs, on appeal.*

JUSTICES' COURTS. (2, 3) *What actions cognizable therein.*

DISCRETIONARY COSTS: (5) *In circuit court, when case cognizable by J. P. When verification of original complaint sufficient.*

1. Where an appeal from a judgment brings up the question of costs in the trial court, and there is no bill of exceptions, that question must be determined from the pleadings and verdict; and all reasonable presumptions will be made to sustain the judgment.
2. In an action in the circuit court merely upon a *quantum meruit* for services, where the damages were laid above the jurisdiction of a justice's court, but the verdict for plaintiff awarded him less than \$50, this court would be obliged to treat the controversy as one cognizable by a justice. *Dunning v. Faulkner*, 10 Wis., 394.
3. A justice cannot take jurisdiction of an action upon an express contract to

Power vs. Rockwell.

pay a certain price for a certain amount of labor and materials, by computation exceeding \$600, averred to be wholly unpaid. 19 Wis., 193; 36 id., 605.

4. Where a complaint joined two causes of action, one upon a *quantum meruit* for services, and the other upon an express contract such as is above described, and the answer, after a general denial, pleaded a special defense to the latter count, confessing and avoiding such express contract, and the verdict was for less than \$50, and the plaintiff had judgment for full costs: *Held*, that the judgment will not be reversed, because it does not appear that the verdict was not for an amount found due plaintiff on such express contract, over and above an amount for which defendant established his special defense, in which case the plaintiff was entitled to his costs.
5. Under ch. 60 of 1862 (which gives discretion to the circuit courts to allow costs upon verified complaints in cases within the jurisdiction of a justice, when the sum demanded shall exceed \$100), the verification of the original complaint claiming over \$100 is sufficient for the discretion of the circuit court to rest upon, though the complaint be afterwards amended in some particulars, not changing the cause of action nor reducing the amount claimed below \$100.

APPEAL from the Circuit Court for *Milwaukee* County.

The complaint in this action contained two counts: 1. For hauling and placing upon a certain lot of the plaintiff and on streets adjoining, before December 1, 1870, 1,889 yards of earth and sand, at an agreed rate of thirty-five cents per yard. It is alleged that this was done at defendant's request; that after its completion he promised to pay for the work at the rate aforesaid; but that he has paid no part of the price, and is indebted to plaintiff for such filling, in the full sum of \$661.15, with interest from the date above named. 2. For labor and services performed for defendant at his request, between November 1 and December 31, 1870, by plaintiff as real estate broker, in examining, appraising and inspecting a large number of lots and pieces of land (which are particularly described) in the city of Milwaukee, negotiating with the occupants thereof and other persons, etc. It is alleged that these services were worth \$250, which became due December 1, 1870. It appears that the original complaint was verified, but

Power vs. Rockwell.

that defendant afterwards filed an amended complaint above described, which was not verified.

The answer contained a general denial, and also alleged as a defense to the first cause of action, that defendant's agreement therein averred was procured solely by plaintiff's false and fraudulent representations that the city authorities had duly ordered said lot and streets to be filled; that defendant, after the work was commenced, upon discovering that such representations were false and fraudulent, immediately rescinded said contract, and notified plaintiff of its rescission and of the grounds thereof; and that plaintiff admitted that said representations were false, and made no objection to such rescission, and soon afterwards took up and hauled away from said streets and lot all the material which he had put thereon under said contract, appropriating the same to his own use.

On the trial, plaintiff had a verdict for \$25. Afterwards he moved that costs be allowed him in the action to the amount of \$56.13, including \$15 as attorney's fees. Defendant objected to such allowance, claiming that the action was one of which a justice of the peace had jurisdiction; that the complaint was unverified; and that the court had no right to tax costs in plaintiff's favor in such a case, where the recovery was less than \$50.. The objections were overruled, the plaintiff's costs taxed at the sum demanded by him, and judgment rendered accordingly, from which the defendant appealed.

The cause was submitted on briefs.

Mariner, Smith & Ordway, for respondent:

1. In an action of such a nature that a justice of the peace is forbidden, by express statute, to entertain jurisdiction of it in any event (such as those mentioned in *Tay. Stats.*, 1353, § 10), the plaintiff on his recovery is entitled to costs. *Tay. Stats.*, 1531, § 54, subd. 3. Such were the cases of *Mecklem v. Blake*, 22 *Wis.*, 495; *Eaton v. Lyman*, 30 *id.*, 41-46. But in a case of a class not so inhibited, and which may, under some circumstances, be brought in justice's court, plaintiff is

entitled to costs only when he recovers fifty dollars or more. *Laubenheimer v. Mann*, 19 Wis., 579. Costs are the creature of positive statute, and we do not understand that any statute exists here giving costs in such an action, based on contract, where the recovery is less than \$50. The statute provides that plaintiff shall have costs "in an action for the recovery of money," where he shall recover \$50 or more. Tay. Stats., 1531, § 54, subd. 4. This necessarily implies that in such an action where the recovery is less, no costs shall be allowed; though the same subdivision makes certain exceptions to this general rule, which are not applicable here. 2. The complaint here was not verified, and for that reason, the recovery being less than \$50, no costs could be allowed. In the circuit court the sum recovered fixes the rights of the parties as to costs. *Dunning v. Faulkner*, 10 Wis., 395.

Winfield Smith, for respondent:

1. The action was one in which the justice's court had no jurisdiction (Tay. Stats., 1352, § 5, subd. 1), and for that reason costs were allowable for plaintiff, of course. Tay. Stats., 1531, § 54, subd. 3; *Millett v. Hayford*, 1 Wis., 401. 2. If the action was within the jurisdiction of a justice, then ch. 60, Laws of 1862 (Tay. Stats., 1531, § 55), would control the case, "the amount claimed by plaintiff in his complaint, duly verified," exceeding \$100. True, the *amended* complaint is not verified; but the original complaint embraces all the substance of the causes of action found in the amended complaint, and is verified; and that brings the case within the reason and spirit of the statute.

RYAN, C. J. There is no bill of exceptions in this case; and we must determine the question of costs from the pleadings and the verdict.

The second cause of action is upon a *quantum meruit* for services. If the recovery of \$25 applied to that count of the complaint only, we should be obliged to hold that "the result

Power vs. Rockwell.

of the trial shows that the controversy was cognizable by a justice of the peace." *Dunning v. Faulkner*, 10 Wis., 394. In such a case, it is only the *ad damnum* which takes the action out of the jurisdiction of a justice; and the plaintiff proceeds in the circuit court, laying his damages above the jurisdiction of a justice, at his peril.

But the first cause of action is upon express contract to pay a certain price for a certain amount of labor and materials, by computation exceeding \$600, averred to be wholly unpaid. It is very certain that even if the *ad damnum* were laid within his jurisdiction, a justice of the peace could not take jurisdiction of an action on the contract pleaded. *Felt v. Felt*, 19 Wis., 193; *Cooban v. Bryant*, 36 id., 605.

It is very true that in pleading such a contract, the plaintiff might evade the jurisdiction of a justice, by overstating the amount of work and materials; and doing so would be at his peril of costs. But that is not the presumption here.

The defendant pleaded a general denial, and a special defense to the first count, confessing and avoiding the contract. *Non constat* that his special defense was not established as to the whole amount except the \$25 recovered. In such case, the respondent would be entitled to his costs; and we are to make all reasonable presumptions in support of the judgment. *Van Patten v. Wilcox*, 32 Wis., 340.

Ch. 60 of 1862 gives discretion to the circuit courts to allow costs upon verified complaints, in cases within the jurisdiction of a justice, where the sum demanded shall exceed one hundred dollars. We think that the object of this statute must have been to enable the circuit court to award costs, in proper cases, to plaintiffs bringing their suits in good faith in that court, but failing to recover \$50.

That being so, it would appear that verification of the original complaint claiming over \$100 is sufficient for the discretion of the circuit court to rest upon, though the complaint be afterwards amended in some particular, not changing the

Barber vs. Rukeyser:

cause of action or reducing the amount claimed to \$100. And this record sufficiently shows that the circuit court is better able than this court, properly to dispose of questions of costs, in such cases, whether of right or of discretion.

By the Court.—The judgment of the court below is affirmed.

BARBER VS. RUKEYSER.

EQUITY: LACHES. *When relief will not be granted against judgment at law.*

1. Equity will relieve against an inequitable judgment at law, where the judgment defendant was ignorant, pending the legal action, of the facts showing such judgment to be contrary to equity; or they could not have been set up as a defense; or he was prevented from availing himself of them, by fraud, accident, or the acts of the adverse party, without negligence or fault on his own part.
2. The attorney of the defendant in a legal action had notice that the action was called for trial, and was requested by an officer of the court to attend at once and look after it, and neglected to appear and set up the defense now alleged. Notice of the taxation of costs and of the entry of judgment was served on said attorney, who failed to appear at the taxation or object to the entry of judgment; and no motion was made to vacate the judgment while it was under the control of the court. During the whole time, the facts now relied upon as showing a defense (if they existed) were well known to said defendant. *Held*, that by reason of his *laches*, equity will not interfere to relieve him from the judgment.

APPEAL from the County Court of *Milwaukee* County.

Action to restrain the collection of a judgment at law previously rendered in the same court in favor of the present defendant, *Adolph Rukeyser*, against *Barber*, the present plaintiff. *Barber* claimed, among other things, and introduced evidence to show, that the judgment was taken in violation of an oral agreement between the attorneys of the respective parties. The facts found by the court are substantially as follows:

Barber vs. Rukeyser.

Two actions were brought successively, in justices' courts, to recover possession of *the same personal property*; the first an action by *Barber*, the present plaintiff, against one Simon Rukeyser, in which *Barber* had judgment and obtained possession of the property; the second an action by *Adolph Rukeyser* against *Barber*, in which the latter again had judgment in his favor. Both of these cases having been appealed to the county court, and being upon the calendar of that court for trial, the parties, on the 17th of September, 1873, stipulated that the case of *Adolph Rukeyser v. Barber* should be continued until *Barber v. Simon Rukeyser* was disposed of, "without prejudice to the right of appeal in both cases;" and it was accordingly so continued. They also entered into a stipulation in each of said cases, as to the facts upon which the legal rights of the parties in respect to the ownership and possession of the property depended. On the 17th of November following, the case of *Barber v. Simon Rukeyser* was tried, and judgment rendered therein in favor of Simon Rukeyser for the value of said property and costs of the action, the defendant therein waiving a return of the property and damages for its detention. By the terms of said judgment the court adjudged that *Adolph Rukeyser* was the owner of the property, and that Simon Rukeyser was *lawfully in possession thereof as his bailee* at the time of the commencement of said action. This judgment was fully paid and satisfied on the tenth of January, 1874. After the entry of said judgment, to wit, on the 20th of November, 1873, the case of *Adolph Rukeyser v. Barber* was noticed for trial by both parties for the December term of the court, but was not tried at that term, and was again noticed for trial by both parties, January 27, 1874, for the following March term. When the cause was reached, the attorney for *Adolph Rukeyser* appearing and moving said cause, the court sent an officer to notify *Barber's* attorney that said cause had been reached, and request him to come at once and attend on the trial

Barber vs. Rukeyser.

thereof. The officer returned, and informed the court that he had notified said attorney, "and was informed by him that he would attend to it." After waiting a sufficient time, the attorney not appearing, the court proceeded with the trial, and a judgment was rendered in favor of *Adolph Rukeyser*, awarding him the possession of the property or the value thereof in case a delivery could not be had, with damages for its detention, and costs, making an aggregate of \$323.68. Notice of the findings, entry of judgment and taxation of costs was duly served upon *Barber's* attorney, who did not appear at or object to the taxation, nor file exceptions to said findings, nor object to the entry of judgment in the action, or to the judgment until after execution had been issued and returned unsatisfied, and proceedings supplementary commenced. On the 24th of April, 1874, upon an affidavit of said attorney, an order was made on *Adolph Rukeyser* to show cause why said judgment should not be set aside; but at the May term, 1874, the motion to set aside the judgment was withdrawn, and the present action commenced. On the 16th of September, 1874, after the commencement of this action, *Adolph Rukeyser* assigned the judgment in question, for value, to his attorney, "with authority to enforce, in such form and manner as he deems fit, the payment thereof, in his name or otherwise, but at his own cost and charge;" and said attorney agreed in writing, if the judgment were sustained and collected for the full amount, to account to *Adolph Rukeyser* for \$50 thereof, "as his share and portion, free and clear of any costs or charges" on account of the services of such attorney in that action or in the present action to vacate such judgment. After this assignment had been filed and entered in the office of the clerk of the court, to wit, on the 13th of October, 1874, *Adolph Rukeyser* executed and delivered to *Barber* a satisfaction of such judgment, in the usual form.

The court further found that "all negotiations with refer-

Barber vs. Rukeyser.

ence to the said cause were had before said stipulations were reduced to writing," and after that time no agreement, verbal or otherwise, was had between the attorneys of the parties with reference to said causes or the disposition that should be made of them.

Upon these facts, the court held that the recovery of said judgment in favor of Simon Rukeyser in the first mentioned action would have been a perfect defense in the action of *Adolph Rukeyser v. Barber*, if such defense had been duly interposed; that the judgment against *Barber* in the last named action had been obtained without any fraud practiced upon him or any undue advantage taken of him in the trial of the action, and after he had had a full opportunity to defend; that the assignment of such judgment, as above described, was not champertous, and the subsequent satisfaction thereof by *Adolph Rukeyser* was void as against the assignee; and that equity would not relieve against the judgment.

The defendant had judgment accordingly. The plaintiff filed exceptions to the findings of fact and conclusions of law, and appealed from the judgment.

The cause was submitted for the appellant on the brief of *Courtland P. Larkin* (*Rogers & Hover*, of counsel), in which it was argued, 1. That the doctrine that a party is estopped by the record where he has neglected to make his defense, does not apply to a case like this; that the guilty knowledge with which the judgment was entered, estops the other party from insisting upon it; and that, the whole transaction being fraudulent and against conscience, equity will relieve against the judgment. 22 Wis., 319. 2. That even assuming that there was no intention of fraud, and that no verbal contract or stipulation was ever in fact made for a discontinuance of the second action, still there can be no doubt that *Barber* and his attorney both understood that such a stipulation had been made; that the payment by *Barber* of the first judgment, under the advice of his attorney in pur-

Barber vs. Rukeyser.

suance of the agreement as he understood it, shows that the attorney acted in good faith, and that the judgment was entered through an excusable mistake on his part; and such judgment, having no just claim to support it, will be relieved against in equity. 6 Wis., 439; 7 id., 542, 607; 11 id., 389; 12 id., 81. 3. That there was at least no ground whatever for imputing any negligence or default to *Barber* himself, through which his defense had been lost, as he had employed an attorney in regular practice to attend to the case in all its stages, had given it a large degree of personal attention, and had finally relied upon what he understood to be a settlement, by which the claim was paid in full; and the case is therefore plainly within the doctrine of *Huebschman v. Baker*, 7 Wis., 542.

J. V. V. Platto, for respondent, contended, 1. That chancery will relieve against a judgment at law, on the ground of its being contrary to equity, only where it appears that "the defendant in the judgment was ignorant of the fact in question, pending the suit, or it could not have been received as a defense, or he was prevented from availing himself of the defense by fraud or accident or the acts of the opposite party, unmixed with negligence or fault on his part" (*Stowell v. Eldred*, 26 Wis., 507; *Merritt v. Baldwin*, 6 id., 439; *Wright v. Eaton*, 7 id., 595); and that this case was not within the rule. 2. That the case of *Rukeyser v. Barber* was on the calendar for trial for at least three terms before disposed of, yet it does not appear that the defense of a former recovery and judgment for the same cause was ever set up in that action. 3. That after the judgment in that action was entered, *Barber* had a remedy at law by moving in the case to open the judgment, obtaining leave to set up the matter now relied on, and having Simon Rukeyser brought in as a defendant, so as to conclude all parties (1 Barb. Ch. Pr., 619; 2 Paige, 26; 1 Clarke Ch., 307, 309; 17 Mass., 394; 14 Wis., 26, 96; 19 id., 597; 21 id., 387; 20 id., 311; 22 id., 311; id., 482; 24 id.,

Barber vs. Rukeyser.

38); and where there is an adequate remedy at law, a complaint in equity will be dismissed. 5 Wis., 397; 20 id., 689; 26 id., 570.

COLE, J. The facts in this case, as proven on the trial and found by the court below, furnish no sufficient ground for granting the relief demanded in the complaint. In *Stowell v. Eldred*, 26 Wis., 504, this court said that the rule was well settled that a court of chancery would relieve against a judgment at law on the ground of its being contrary to equity, when the defendant in the judgment was ignorant of the fact in question pending the suit, or it could not have been received as a defense, or when he was prevented from availing himself of the defense by fraud or accident, or the acts of the opposite party, unmixed with negligence or fault on his part. The ground for impeaching the judgment in this case is, that it is inequitable and unjust, and was in violation of a verbal stipulation between the attorneys, that, in the event the action of the plaintiff against Simon Rukeyser was decided in favor of the defendant in that action, then the suit in which the judgment sought to be enjoined was obtained, should be discontinued. There is great conflict in the evidence whether any such verbal stipulation was entered into, and the court found that there was not. But, assuming the fact to be otherwise, yet the plaintiff has been guilty of such gross laches as must preclude him from asking relief against the judgment.

It appears that the attorney of the plaintiff had notice that the case of *Adolph Rukeyser* was called for trial, and he was requested by an officer of court to attend at once and look after it. He neglected to appear and set up the defense that by the stipulation, or in consequence of the payment of the judgment in the Simon Rukeyser case, this cause was to be discontinued. Furthermore, notice of the taxation of costs and of the entry of judgment was served upon the attorney of the present plaintiff, and such attorney failed to appear at the

The State ex rel. Posey vs. The Supervisors of Crawford County.

taxation or object to the entry of judgment. No attempt was made, by motion, to vacate the judgment within the term at which it was rendered, or while it was under the control of the court, upon any ground upon which it is now sought to impeach it. All the facts then existed, within the knowledge of the party, affecting the justness and integrity of the judgment. When a party is in possession of all the facts constituting his defense, has an ample opportunity to avail himself of them, but absolutely neglects to do so while relief in the action itself is within the reach of the court, he must abide the consequences. "Equity always discountenances laches." 1 Story's Eq. Jur., § 64 a.

By the Court. — The judgment of the county court is affirmed.

THE STATE ex rel. POSEY vs. THE SUPERVISORS OF CRAWFORD COUNTY.

CONSTRUCTION OF OFFICIAL RECORDS. (1) *General rule of construction. Presumption as to records, where authority appears.* (2) *Effect of resolution that a certain order be entered on the journal.* (3) *Record as to presence and votes of members, construed.*

1. In passing judicially upon official records, where authority appears or is implied by law, they will be construed according to their intent, and it will be assumed that the proceedings were rightly had, in the absence of all suggestion in the record to the contrary.
2. Where a board of supervisors resolved that an order be entered on its journal purporting that the board ordered and determined "as follows:" *Held*, that the board, *ipso facto*, ordered and determined what followed.
3. The record of the proceedings of such a board contains this entry, as of a specified date: "Board met pursuant to adjournment. Roll called by clerk. Members all present;" and then states that a certain resolution was offered by a person named, and was passed, "all members voting in the affirmative but one." *Held*, that this record imports that the vote was by a full board, all the members except one voting for the resolution; and the court cannot intend facts inconsistent with it for the purpose of making it bad.

The State ex rel. Posey vs. The Supervisors of Crawford County.

APPEAL from the Circuit Court for *Crawford* County.

On the relator's petition, said circuit court made an order requiring the *Board of Supervisors of Crawford County* to show cause why a peremptory writ of *mandamus* should not issue against them, requiring them to admit the relator as a member of said board, and permit him to participate in its proceedings. The ground upon which the relator prayed for the writ was, that at the annual town meeting of the town of Union in said county, held on the 6th of April, 1875, he was duly elected chairman of the board of supervisors of said town; that he had duly qualified as such chairman; that as such he was by law a member of the county board of supervisors; and that the board, at its next meeting thereafter, refused to recognize him as such. The respondents made return to the order, in substance, that the town of Union had been vacated and annexed to the town of Marietta by an order of the county board of supervisors duly made and entered on the 19th of September, 1874, and duly published; and that it had ever since remained a part of the said town of Marietta.

The only question presented by the record is as to the legal construction of the record of certain proceedings of said board of county supervisors, of which a certified copy was put in evidence, as follows: "Copy of the proceedings of the county board of supervisors of Crawford county, at the annual session, November, 1874. Proceedings of November 19.

"Nov. 19. — Afternoon session. — Board met pursuant to adjournment; roll called by clerk; members all present. Mr. Folsom offered the following resolution in relation to the annexation of the towns of Union and Marietta, which was passed, all members voting in the affirmative but one.

"*Resolved*, That the resolution adopted by this board Nov. 17, 1874, consolidating the towns of Union and Marietta, being informal and not in the form required by the statute, be expunged from the journal, and the following order be spread on the journal at length:

The State ex rel. Posey vs. The Supervisors of Crawford County.

“The board of supervisors of the county of Crawford do order and determine as follows:

“1. That the town of Union in said county be, and the same is hereby, vacated.

“2. That all that part of the territory of the county of Crawford heretofore and now comprising the town of Union be and the same is hereby attached to, and shall hereafter be attached to and made a part of the town of Marietta, in said county, for all political purposes whatever.

“3. All the books, papers and property heretofore belonging to the town of Union, shall hereafter belong to and be delivered over to the town of Marietta.

“4. All moneys, orders and vouchers in the hands of or under the control of the town treasurer of the town of Union, shall be delivered over by the treasurer of said town to the treasurer of the town of Marietta.

“5. That the next town meeting of the said town of Marietta be held at Millet's school house, in said town.

“6. That this order shall take effect and be in force from and after the first Monday in April, A. D. 1875.

“7. That this order be published in the *Courier and Prairie du Chien Union*.

“Done at Prairie du Chien by the county board, this 19th day of November, 1874.”

The court held that the town of Union had been vacated by the proceedings above recited, and rendered judgment against the relator, from which he appealed.*

The cause was submitted on briefs.

Thomas & Webster, for appellant:

1. The adoption of a resolution to spread on the journal of the board an order to vacate a town does not adopt the order, but merely authorizes it to be spread upon the journal. The

* Subd. 1, sec. 28, ch. 13, R. S., provides that “no town shall be vacated unless a majority of the votes of all the members of the board shall so decide.”

The State ex rel. Posey vs. The Supervisors of Crawford County.

vote is upon the resolution, and not upon the order. When an act or order is proposed to a legislative body, about which there is a difference of opinion, it is very common to have it spread upon the journal, so that all may see it and have a better opportunity to consider it; and a vote for that purpose is not construed as one for the adoption of the act or order. 2. The record does not show that all the members of the board were present *at the time of the passage of the resolution*, nor that a majority of *all the members of the board* voted in its favor. The calling and recording of the names and votes of the members would show that fact, if it were a fact. The statement made in the record here is a mere statement of the opinion of the clerk. If all the members of the board were present at the opening of the afternoon session, some of them may have been out of the room when the vote was taken, and only a majority of those then present may have voted in the affirmative.

George C. Hazelton, for respondent:

The order vacating the town of Union being in due form of law, and being a material part of the resolution adopted, the passage of the resolution by the votes of a majority of all the members of the board, carried with it the order. The act of the board being one of a legislative character, all presumptions are to be indulged in favor of its regularity; and those who would impeach it have the burden of disproving a compliance with the conditions imposed by law upon the exercise of the power. In this case no such proof is attempted. *The People v. Carpenter*, 24 N. Y., 87. The maxim of the common law applies to the case: "*Omnia præsumuntur solenniter esse acta.*" Broom's Leg. Max., 729.

RYAN, C. J. There is an inherent infirmity in the use of language; and therefore it is judicial duty to give it construction, *ut res magis valeat quam pereat*. The records of official action are subject to this common infirmity; and therefore in

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

passing judicially upon them, when authority appears or is implied by law, *omnia præsumuntur rite acta, donec probetur in contrarium*. We must construe these proceedings according to their intent, and assume that they were rightfully had, in the absence of all suggestion in the record to the contrary.

When a public body resolves that an order purporting to be its own, and within its authority, shall be spread upon its journal, without limitation or qualification, it must be held to adopt the order. When the board of supervisors resolved that an order be entered in its journal, purporting that the board ordered and determined as follows, it *ipso facto* ordered and determined what followed. And when it appears in the record of the proceedings that there were "members all present," and that the resolution passed, "all members voting in the affirmative but one," the record imports that the vote was by a full board, all the members excepting one voting for the resolution. "Every string ought to give his sound." 3 Buls., 103. That is the record; "and the court cannot intend facts inconsistent with it, for the purpose of making it bad." 1 Dougl., 159.

By the Court.—The judgment of the court below is affirmed.

THE PHOENIX LEAD MINING & SMELTING COMPANY VS. SYDNOR and others.

BETTERMENT ACT. (1) *Applicable to recovery of undivided interest.* (2) *Remedy by independent action, under sec. 33.* (3) *Proceeding in ejectment suit must be commenced before judgment.*

1. Secs. 30-33, ch. 141, R. S., authorizing defendants in ejectment, in certain cases, to recover the value of their permanent improvements on the land, apply to an action in which the plaintiff recovers an undivided interest as *cotenant* of the defendant; and in such cases the court may apportion the expense of the improvements according to the respective interests of the parties.

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

2. Where an ejectment defendant has a valid claim for improvements *under sec. 33 of said chapter*, his lien for their value may be enforced in an independent action, so long as the statute of limitations has not run against it, and the property is owned by the ejectment plaintiff.
3. But where it is sought to enforce such a claim under said section 33, *in the ejectment suit*, the proceedings for that purpose must be taken after verdict and *before judgment*, in analogy to the rule in cases under secs. 30-32, as established in *Scott v. Reese*, 38 Wis., 636.

APPEAL from the Circuit Court for *La Fayette* County.

In January, 1867, *Sydnor and others* (the defendants in this proceeding) commenced an action of ejectment in said circuit court against the *Phoenix Lead Mining & Smelting Company* and another, to recover possession of an undivided one-sixth of certain land; the title to the remaining undivided five-sixths of the land being admitted to be in the defendants to that action. The action was tried at the June term, 1870; the plaintiffs therein had a verdict; a motion made for a new trial on the ground of alleged errors, was denied; and a judgment for the plaintiffs was subsequently entered as of the said term.

An appeal was taken to this court, where the judgment was affirmed in December, 1871. 29 Wis., 226. After the cause had been remitted, viz., on the 1st of July, 1872, the circuit court, on motion of the defendants therein, made an order vacating its former judgment, and granting a new trial, which defendants claimed as of right under the statute; but the order was reversed by this court on appeal. 32 Wis., 406. The cause was again remitted to the circuit court in May, 1873; and at the following June term the *Phoenix Lead Mining & Smelting Company* moved for a new trial on the ground of newly discovered evidence, which motion was denied on the 12th of July, 1873.

The defendants in the ejectment suit then filed a claim for valuable and permanent improvements made by the defendant company upon the land in controversy, and demanded that an

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

issue be made up for the purpose of ascertaining the value of such improvements.

It was stated in this claim that the defendant company claimed title to said land under a warranty deed dated November 24, 1864, from Caroline F. Strong and her husband, Moses M. Strong; that said Caroline F. Strong claimed title under a deed to her dated September 15, 1862, from William T. Henry and wife; that said Henry claimed title under a deed to him dated September 12, 1862, from the sheriff of La Fayette county, upon an execution issued out of said court against the property of the Western Wisconsin Mining Company; that said last mentioned company claimed title under a warranty deed to it, dated June 19, 1854, from Moses M. Strong and wife, and also under a deed executed on the 5th of March, 1856, to said Strong by Henry H. Ensign, clerk of the board of supervisors of La Fayette county, said Ensign then and there being an officer authorized by the laws of this state to execute the same, on account of certain sales of said land in the years 1847-8-9 and 1850, for the payment of taxes, which title, so conveyed by the deed of said Ensign, said Western Wisconsin Mining Company claimed to have enured to it. It was further stated that the ejectment plaintiffs claimed title from another source than that above described.

A copy of this claim was served upon the plaintiffs in ejectment, with an order requiring them to show cause why such issue should not be made up. The plaintiffs in ejectment, claiming to appear specially for that purpose only, alleged for cause, *inter alia*: 1. That the court had no longer jurisdiction of the subject matter or of the persons of the plaintiffs, to try the matters set forth in said order. 2. That defendants were at the time of making the alleged improvements, and still continued to be, cotenants with the plaintiffs of the premises, whereof an undivided one-sixth had been recovered by said plaintiffs; and that it did not appear, and was not true, that during the time in which said improvements were made

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

the defendants were in possession of the property in dispute *adversely* to the plaintiffs, or that they were in possession at all. 3. That said claim did not show, and it was not true, that at the time said improvements were made, the defendants, or those under whom they claim, were in possession *claiming title under any tax deed* or other instrument mentioned in sec. 30, ch. 141, R. S. Afterwards, on September 24, 1873, the court made an order directing the impaneling of a jury at its next term to try the issue between the said *Phoenix Lead Mining & Smelting Company* as plaintiff and said *Sydnor and others* as defendants, as to the making of the alleged improvements in good faith upon the said land by said company or its grantors, and as to the value of such improvements. By subsequent orders, the parties to such issue were twice permitted to file amended pleadings; and the second amended complaint stated, *inter alia*, that the *Lead Mining & Smelting Company* claimed under the above mentioned warranty deed of November 24, 1864, from Caroline F. Strong and her husband, Moses M. Strong, and that the "source and chain of the title of said Caroline F. Strong" to the undivided interest in controversy was, (1) A deed of said undivided interest from one Hollister to Moses M. Strong, dated April 25, 1854, executed and received in good faith, for full value. It is alleged further that Moses M. Strong, on said 25th of April, 1854, was seized of the undisputed title in fee of the remaining undivided five-sixths of the land described. (2) A deed from Moses M. Strong and wife to the Western Wisconsin Mining Company, dated June 19, 1854, of the whole of said land. (3) A deed, dated September 12, 1862, conveying to W. T. Henry the title of the Western Wisconsin Mining Company to the whole of said land, executed by the sheriff of La Fayette county in pursuance of a sale upon execution against the property of said mining company. The defendants demurred to this complaint, on the grounds, among oth-

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

ers, that the court had no jurisdiction of the persons of these defendants, or either of them, or of the subject of the action; and that the complaint did not state a cause of action. From an order overruling their demurrer, the defendants in this proceeding appealed.

The cause was first argued at the August term, 1875.

S. U. Pinney, for the appellant, contended, 1. That when the claim for improvements was filed, the court had lost all power over the judgment, to change it in any respect, or to recall the parties for the purpose of further litigation in that action. *Thomas v. Rewey*, 36 Wis., 328. 2. That the effect of the decision above cited could not be evaded by urging the claim as one made under sec. 33, ch. 141, R. S., instead of the three preceding sections; that the original claim was obviously made under secs. 30-32, and the second amended claim, proposed after the decision of *Thomas v. Rewey*, was a lame attempt to bring the case under sec. 33; that the order directing the issue to be made up was made under sec. 31, and had never been amended or changed; and that this order gave to the proceeding its whole vitality, and determined its character. 3. That the remedy provided by sec. 33 is entirely inapplicable to the case of an ejectment defendant claiming under deeds of such a character that they entitle him to the relief provided in secs. 30-32. 4. That it is plain from the record that the *Phoenix Lead Mining & Smelting Company* claims under a tax deed, and also under a sheriff's deed on execution sale, and that the latter, especially, is an essential link in its chain of title, without which it has not color of title; and that its remedy, therefore, was under secs. 30-32. 5. That even if the company had a remedy under sec. 33, the demurrer should have been sustained, because, (1) If that section contemplates a proceeding in the ejectment suit, such a proceeding is *too late* after the court has lost control of the judgment in that suit. The reasoning of *Thomas v. Rewey* is entirely applicable to such a proceeding. (2) The remedy given by sec. 33 is

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

really a *separate action*. The provisions of that section are too meager to enable the court to give a remedy supplemental to verdict in the same action. 6. That when the order of the circuit court of July 1, 1872, vacating the judgment in favor of the ejectment plaintiffs, was reversed by this court, and the remittitur was duly filed, the effect of that order totally ceased, and the judgment of the circuit court became operative. At all events, if any further order of the circuit court is technically necessary, it is a mere formality, a matter of course, and can be entered at any time in the court below, and its absence will be disregarded by this court. *Chautauqua County Bank v. White*, 23 N. Y., 347; 2 Whit. Pr., 828; 2 Till. & Shearm. Pr., 964; 2 Wait's Pr., 288.

M. M. Strong, for the respondent, argued, 1. That it had a right to a judgment for the value of the improvements, under sec. 33, ch. 141, R. S. (1) The court will give to sec. 30 its most obvious construction; and under such a construction "a claim of title under or by virtue of a deed from an officer" will be held to mean that the deed is from the officer *directly* to the party claiming the title, and not merely to some party through whom the title is remotely derived. (2) Secs. 30-32 relate only to persons claiming under *tax deeds* executed to them, or at most to persons claiming titles originating in tax deeds. This restriction harmonizes with the language of those sections, is necessary to give due effect to sec. 33, and is clearly indicated in the decision in *Oberich v. Gilman*, 31 Wis., 495. This court has already decided (29 Wis., 226) that the tax deed from Ensign did not enure to the respondent's benefit, and it cannot claim to have had possession under that deed; and the second amended complaint, to which the demurrer was made, contains no claim on account of that deed. 2. That even if the respondent's remedy was under secs. 30-32, the claim was not made too late. When an appeal was taken from the judgment of the circuit court, that judgment ceased to be effective, and the circuit court had no

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

further jurisdiction of the case until it was remitted from the supreme court, upon which it devolved upon the circuit court to enter final judgment in accordance with the order of affirmance. Laws of 1860, ch. 264, ch. 7 (Tay. Stats., 1632-3); Powell on Appellate Proceedings, 371; *Long v. Hitchcock*, 3 Ohio, 274; *Bassett v. Daniels*, 10 Ohio St., 617; *Legg v. Overbagh*, 4 Wend., 188; *Delaplaine v. Bergen*, 7 Hill, 591; *Miner v. Medbury*, 7 Wis., 100; *Carney v. Emmons*, 9 id., 114; *Hopkins v. Gilman*, 23 id., 512. Before any steps had been taken to have such a final judgment entered, the circuit court granted a new trial as of right under the statute; and on appeal this order was reversed, and the cause "remanded for further proceedings" (32 Wis., 411). How could all this be, if the old judgment of 1870 was final and still in force? The second remittitur was filed May 22, 1873, and on June 13th the attorneys of the ejectment plaintiffs served a notice that they would "apply to the court for such judgment or order as the plaintiffs might be entitled to in pursuance" of such remittitur. Action upon this motion was prevented, first, by respondent's motion for a new trial on the ground of newly discovered evidence; and afterwards by respondent's interposition of its claim for improvements. At that time no final judgment had been entered, the court had full control of the case, and all the parties were before it. 3. That when the claim is under sec. 33, there is no statutory limit of the time for making it. If it is not made until after the court has so far lost control of the cause that it cannot summon a jury to assess the value of the improvements, the ejectment defendant would still have a lien on the real estate for the value of his improvements, but it would probably be necessary to resort to an original proceeding to enforce such lien. But this case is free from that embarrassment.

By order of the court, the cause was reargued at the January term, 1876, upon the question whether secs. 30-33, ch. 141, R. S., apply to *undivided interests* in land.

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

J. C. Gregory, for appellants:

The sections of the statute in question establish rights which did not exist at common law or in equity and give a peculiar remedy (which is the only one) for enforcing such rights. *Oberich v. Gilman*, 31 Wis., 497; *Huebschmann v. McHenry*, 29 id., 655; *Claussen v. Rayburn*, 14 Iowa, 136. This remedy, though supplemental to the action of ejectment, forms no part of the remedy by ejectment. And the right given is not an outgrowth of the action of ejectment, so as necessarily to exist whenever that form of action is maintainable. There is no analogy between the cases of two defendants against whom judgment in ejectment has been rendered, and both of whom have made valuable improvements in good faith, but against one of whom the recovery is of the whole estate, while against the other it is of an undivided interest only. In the former case such improvements would be absolutely lost to the defendant. In the latter case he would only be required to share the possession of the improved estate with the plaintiff; and in case of partition, the improved portion of the estate would be assigned to him at a valuation independent of such improvements, or he would be compensated in some other equitable manner. *Reed v. Jones*, 8 Wis., 421; *Warner v. Fountain*, 28 id., 414; *Dech's Appeal*, 57 Pa. St., 467. The statute was intended, therefore, to meet cases of the former kind, and the words "recover" and "recovery," in secs. 30 and 33, should be construed to mean a *recovery in fact*, such as would divest the defendant of the possession. 2. If these sections apply between tenants in common, the effect is to reward the defendant for his *wrongful* act in *ousting* the plaintiff from the common estate; and this fact alone should dictate a different construction. One tenant in common may take possession of the entire estate, claiming the whole, but giving no such notice, actual or implied, to his cotenant, as will enable the latter to maintain ejectment (*Sydnor v. Palmer*, 29 Wis., 254); and having made improvements under

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

these circumstances, the tenant in possession has but to commit the wrongful act of ousting his cotenant by giving notice of the hostile character of his claim, or by acts tantamount to notice. The cotenant out of possession is then driven to his action of ejectment, and the tenant in possession is enabled, as the direct fruit of his wrongful act, to charge the value of his improvements upon the estate of his cotenant. 3. As between tenants in common, the verdict in ejectment simply establishes the fact that at the commencement of the action the defendant was in the possession of the estate, and had ousted the plaintiff therefrom. Sec. 10, ch. 141, R. S. But to entitle a defendant in ejectment to compensation for improvements, his possession *at the time the improvements were made* must have been under claim of title adverse to the plaintiff. *Keas v. Burns*, 23 Iowa, 235; *Bent v. Weeks*, 46 Me., 524; *Peabody v. Hewett*, 52 id., 33; *Pratt v. Churchill*, 42 id., 471. In a case like the present, the character of the defendant's possession when the improvements were made, is not established by the verdict, and must be tried in this proceeding before he can recover. But these sections contemplate the trial of no such issue in this supplemental proceeding, and are therefore inapplicable in such cases.

M. M. Strong, for the respondent:

1. An actual ouster, by the ejectment defendant, of the plaintiff, who claims title to an undivided interest in the land, is a denial and repudiation by such defendant, of the plaintiff's claim of a tenancy in common; and all the rights, liabilities and remedies of the parties in reference to each other are the same as they would be if there were no claim of tenancy in common. 2. The pleadings and verdict in this case show beyond question that there was no tenancy in common of the undivided one-sixth interest claimed and recovered by the plaintiffs. The fact that the defendant was the undisputed owner in fee of the other five sixths of the land cannot affect the question of its right to the value of its improvements.

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

That question must be determined in the same manner as it would have to be if the parties to the litigation had no interest in the other five-sixths. 3. It is clearly within the power of the legislature to confer the right in question *in all cases* where the defendant in ejectment, who has made valuable and permanent improvements, is defeated in the action; and in determining, in any given case, whether the right has been conferred, the court has only to determine whether the case is *within the general designation of cases*, and meets the statutory conditions. Secs. 30-32 confer the right in question upon "any person," without restriction or qualification, upon certain conditions; and "the word 'person' may extend and be applied to bodies politic and corporate as well as individuals." R. S., ch. 5, sec. 1, subd. 12. The conditions prescribed by said sections are all alleged to exist in this case. Sec. 33 confers the right of recovering the value of improvements "in all cases," upon certain conditions, which are alleged in this case. Applying the statutory rule which requires that the words of these sections "shall be construed and understood according to the common and approved usage of the language" (R. S., ch. 5, sec. 1, subd. 1), it seems to follow conclusively that they include a claim for improvements made upon land for an *undivided interest* in which a recovery has been had. And see *Davis v. Louk*, 30 Wis., 308.

COLE, J. The first question to be considered is, Do secs. 30, 31, 32 and 33, ch. 141, R. S., apply to actions brought to recover an undivided interest in land, so as to give a tenant in common, who has been defeated in an action to recover possession of such undivided interest, a claim against his cotenant for his improvements in whole or in part? The question is fundamental in this case, and was not discussed upon the first argument. In our examination of the cause, we had some doubt whether the statute did not restrict the right to cases where there was a recovery of the possession of

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

the whole estate, and therefore a reargument of the question was ordered, whether it applied to a case where there was a recovery of an undivided interest only. The plain intent of the statute is to secure to a *bona fide* possessor of land, on a recovery against him in an action of ejectment, compensation for his improvements; but the statute needs further legislation to carry out in all cases the equitable principles upon which it is founded. Cases do and will often arise, where it would be difficult and unjust to apply its provisions; as where the plaintiff in ejectment claims and recovers an estate less than the fee, as an estate in dower, or for life, or for a term of years. In such cases it is manifestly unjust to impose upon the plaintiff the entire burden of the improvements; but the statute makes no provision for bringing in other parties so as to enable a full and just adjustment of the expense of the improvements to be made between all parties interested in the estate and benefited by them. As it now stands, the statute is defective and urgently needs amendment. And in the case before us, while we are inclined to hold that the statute applies to an action to recover an undivided interest in the land, still, the power of the court to apportion the expense of the improvements between the tenants in common according to their respective interests, is one arising by implication rather than conferred by express grant, as it should be. But while the matter may not be beyond the reach of the court under the statute, yet it must be confessed that the way is not very clearly pointed out or provided, as it easily might be by the legislature, for adjusting the rights and equities of the parties, where one tenant in common has in good faith made beneficial improvements on the estate.

The learned counsel for the plaintiffs in ejectment claims that the reason and policy of the statute fail in the case of a recovery of an undivided interest, because, he says, the defendant surrenders nothing, but only shares the possession of the improved estate with his cotenant, and, in an action for

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

a partition, can secure compensation for improvements made by him. But a court of law, proceeding under the partition statute, is inadequate to make a full and just adjustment of the expenses of the improvements; though it would be otherwise in a court of equity. See Story's Eq. Jur., §§ 655 et seq. Still, the question is, Does the betterment statute give one tenant in common, after a recovery against him by his cotenant of an undivided interest, the right to compensation for valuable improvements made in good faith upon the common estate? We have already indicated the opinion that it did, and that the court, under the sections first referred to, had power to apportion the expense of the improvements according to the interest of the parties. There is, doubtless, an inherent difficulty, or rather inaccuracy, in saying, in such a case, that the improvements have been made on the lands recovered, because, in fact, only an undivided interest is recovered in the common estate upon which the improvements are made. But the intent of the statute, if manifest, must prevail, however inaccurately it may be expressed in the language used. Under sections 15 and 16, where the plaintiff in ejectment recovers any estate, share or interest in land, the defendant has the right to set off permanent improvements made on the premises against the plaintiff's damages for the unlawful withholding, including the mesne profits; and these provisions were held in *Davis v. Louk*, 30 Wis., 308, to apply to a case where there was a recovery of an undivided interest by one tenant in common against his cotenant. There the value of the improvements was apportioned according to the rights and interests of the respective parties, and this court thought the statute sanctioned such an equitable adjustment. That case, as far it goes, is strongly in favor of a construction of secs. 30, 31, 32 and 33, which gives a tenant in common his claim for improvements against his cotenant. And such construction derives support from the last clause of sec. 31, which provides that if the jury "find

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

that the plaintiff is entitled to recover any sum for or on account of such improvements, judgment shall be rendered for such sum as they shall so assess and award." Therefore, taking the various sections of ch. 141 together, considering the object and spirit of the provisions relating to the claim of improvements made by the party in possession "in good faith and in the mistaken belief that he had acquired a title from the rightful owner" (2 Kent, 334), we feel warranted in holding that they apply to actions for an undivided interest in land. See, also, *Blodgett v. Hitt*, 29 Wis., 170.

In this case the counsel do not agree as to the proper construction and effect to be given the claim for improvements, and as to whether it is made under secs. 30, 31 and 32, or under sec. 33. They substantially agree, however, in the position that the proceeding taken to enforce the claim is in the ejectment suit, and is not an independent action instituted for that purpose. If the claim is made under secs. 30, 31 and 32, the practice to be adopted, as well as the time for making the claim, are fully pointed out in *Thomas v. Rewey*, 36 Wis., 328, and *Scott v. Reese*, 38 id., 636. In the former case the chief justice says: "Upon careful consideration of all the provisions of the sections in question, we hold that the claim of the defendant in ejectment must be made either before judgment upon the verdict, or at latest within the term at which the judgment is rendered, and while the judgment remains under the control of the court. We do not pass, in this case, upon the question, whether the claim must not be made before judgment. But we hold that, when judgment has been rendered on the verdict, and the term of the court has ended, it is too late for the defendant to recall the cause and the plaintiff to the court, by this supplemental proceeding; and that what is done after the term of judgment cannot be considered as done forthwith after verdict." In *Scott v. Reese*, it was held "that the claim and the issue upon it must not only be made,

The Phoenix Lead Mining & Smelting Company vs. Sydnor and others.

but that the issue must be tried, before any judgment should be rendered in the ejectment." p. 639.

If it is sought to enforce the claim in the ejectment suit under section 33, then, in analogy to the rule laid down in *Thomas v. Rewey* and *Scott v. Reese*, the proceeding for that purpose must be taken subsequent to the verdict and before judgment. Sec. 33 also provides that in all cases where a recovery is had of lands on which the party in possession, or those under whom he claims, holding adversely by color of title asserted in good faith, founded on descent or any written instrument, shall have made valuable improvements, such party shall have a lien on such real estate for the value of such improvements. This lien may be enforced in an independent action, so long as the property is owned by the plaintiff in ejectment and the statute of limitations has not run upon it. It is analogous to a vendor's lien for purchase money, and liable to be cut off by a sale of the property, for a valuable consideration, to a purchaser without notice of it. The same section further provides that the lien may be enforced in the ejectment suit itself by a supplemental proceeding, as in the case where recovery is had against a party claiming title under a tax deed. Such was the proceeding confessedly taken here, being a proceeding in the action of ejectment; and we must therefore hold, in accordance with the rule laid down in *Thomas v. Rewey* and *Scott v. Reese*, that it was taken too late. It is true, the section is silent as to when the jury shall be summoned to assess and ascertain the value of the improvements; but it is clearly implied that it must be done while the court has control of the ejectment suit. It is said the demurrer should be considered as to the whole complaint as amended, and that it appears that no final judgment has yet been rendered in the ejectment. This position is clearly not supported by the record. It does appear beyond all controversy that final judgment was rendered in the action

Stowell and others vs. Eldred.

of ejectment long before this supplemental proceeding was instituted. Such being the case, the court had lost jurisdiction of the persons of the plaintiffs in the original suit, as well as all jurisdiction of the action of ejectment, and had no power to entertain it for any purpose. These remarks dispose of the case.

It follows from these views that the order of the circuit court overruling the demurrer must be reversed, and the cause must be remanded for further proceedings in accordance with this decision.

By the Court. — So ordered.

STOWELL and others vs. ELDRED.

CONTRACTS: EVIDENCE: PRINCIPAL AND AGENT: FORFEITURE: SPECIFIC PERFORMANCE: PLEADING: VARIANCE. (1, 2) *Contract under seal by agent in his own name: General rule and exceptions.* (3) *Parol evidence that contract was made for benefit of third person.* (4) *Contract by A. for assignment to him of judgment against B: Default before assignment, after payments with B's property: Rights of A.: Rights of B. in action against him on the judgment.*

PLEADING: VARIANCE: EQUITABLE COUNTERCLAIM. (5) *When averments in answer will be treated as counterclaim.* (6) *Allegation of legal defense, with evidence of equitable counterclaim.* (7, 8) *Action on judgment: equitable counterclaim on the ground that judgment plaintiff, called as a witness for defendant, testified falsely as to facts within his knowledge.*

PRACTICE: AMENDMENT. (9) *Amendment of complaint after reversal of judgment.*

1. The rule, that a contract under seal, executed by an agent in his own name, does not bind, nor confer any rights upon, the principal in whose behalf it was really made, when he is not named therein, is subject to many exceptions.
2. Thus, where the instrument *would be valid without a seal*, it is to be treated, though in fact under seal, as mere evidence of a simple contract.
3. The rule which forbids the terms of a written contract to be changed by

 Stowell and others vs. Eldred.

parol evidence, will not prevent one not a party to the contract from showing that he has rights under it because it was entered into for his benefit; though neither party to the contract can show, for the purpose of relieving himself from liability thereon, that one of them was a mere agent for a third person.

4. One F., in his own name, entered into a contract under seal with plaintiffs for the purchase of a judgment recovered by the latter against defendant, in Illinois. By the terms of the contract, the judgment was to be paid for in certain property and certain sums of money for which F. then gave his notes; it was to be assigned to F. when all the payments should be fully made; and, in case of his default, plaintiffs might declare the agreement void, and all previous payments forfeited. After payments on the contract amounting to \$4,100, F. made default, and plaintiffs notified him of their election to consider the agreement void and the payments forfeited, but did not offer to return his notes for the amount unpaid. In this action on the Illinois judgment, defendant set up as a defense in part, that F. made the above described agreement with plaintiffs as defendant's agent, and for his benefit; and that the money and property paid by F. upon such agreement belonged to defendant, who had thus, through F. as his agent, *paid plaintiffs on their judgment* said sum of \$4,100. *Held,*

(1) That plaintiffs, not having offered to return F.'s notes before the trial, never exercised in a valid manner their option to consider the contract with him void and payments thereon forfeited.

(2) That until defendant asserted his rights under said contract as principal, F., in a suit by him for specific performance, upon tendering payment of the balance due thereon, might have compelled an assignment to him by plaintiffs of the Illinois judgment.

[(3) Whether equity would have relieved against the forfeiture, if plaintiffs, upon giving notice of their election as above stated, had offered to surrender to F. his notes, is not here determined.]

(4) That defendant's rights are coextensive with those which F. would have in such a suit by him to compel a specific performance by plaintiffs of their contract; and, as equivalent to a decree that plaintiffs assign the judgment to F. for his benefit, defendant would be entitled in this action, *upon a proper counterclaim in equity*, after tendering, or paying into court, the amount equitably due, to a decree declaring the judgment satisfied, and restraining its further collection.

(5) That as the answer alleges *payments on the judgment as a legal defense*, instead of setting up the facts by way of equitable counterclaim, evidence of such facts should have been rejected, as not tending to establish such legal defense.

5. Hereafter no averment in an answer will be held by this court to consti-

Stowell and others vs. Eldred.

tute a *counterclaim*, unless it be so denominated, and the proper relief prayed.

6. The variance between a mere legal defense of payment and an equitable counterclaim for specific performance, is material and vital, and cannot be disregarded, or cured by summary amendment on the trial.
7. The judgment in suit was for rent alleged to have accrued under a written lease between July 1, 1861, and April 1, 1863. The lease had in fact been surrendered to plaintiffs, and accepted by them, through their duly authorized agent, in January, 1862, and the premises relet by them to other tenants. Defendant set up these facts in plaintiffs' former action, as a partial defense thereto; and, having failed, after due diligence, to obtain the testimony of said agent, called as a witness one of the plaintiffs, who was the only one of them residing in Illinois, and personally knew said facts (as did all the plaintiffs); but the witness denied the facts, and in consequence of such denial, the judgment in plaintiffs' favor was for \$6,500 more than it would have been if said plaintiff had testified to the truth. *Held*, that in this action upon such judgment, defendant may maintain an *equitable counterclaim* for said sum of \$6,500. 26 Wis., 604.
8. Although in a prosecution against said witness for perjury, he might allege forgetfulness of the facts at the time, to disprove a criminal intent, yet plaintiffs cannot be heard in this action to allege such forgetfulness by one of their number to enable them to recover from defendant a large sum of money which in justice and equity they ought not to recover.
9. In reversing so much of the judgment herein as declares the judgment sued upon to be satisfied to the extent of the \$4,100 paid by F. on his said contract, and enjoins plaintiffs from seeking to collect that amount, this court directs the trial court to permit an amendment of the answer by inserting therein an equitable counterclaim founded on the contract between F. and plaintiffs, and the subsequent payments thereon, and upon such amendment, made within a reasonable time, to award a new trial; otherwise, to render judgment for plaintiffs for the amount of the judgment in suit, less \$6,500.

APPEAL from the Circuit Court for *Milwaukee* County.

The plaintiffs and certain infant wards of the plaintiff *Mary A. Stowell* being the owners of certain real estate in the city of Chicago, the plaintiffs, in the year 1856, leased the same to one Grey for a term to commence April 1st in that year, and to terminate April 1, 1863. The rent reserved in such lease was \$9,000 for the first year, with an increase of \$1,000 each

Stowell and others vs. Eldred.

year, so that for the last year of the term the stipulated rent was \$14,000. In December, 1856, Grey assigned this lease to the firm of Eldreds & Balcom, which firm was composed of the defendants in this action, *Anson Eldred* and Elisha Eldred, with one Uri Balcom. In March, 1860, the plaintiffs and Eldreds & Balcom entered into a written agreement reducing the rent reserved in the Grey lease, on certain conditions, to \$5,000 per year, from and after October 1st in that year, and providing that the rent should be paid quarterly, and that the lessees should pay all taxes and assessments on the leased premises. The rent reserved in the lease as thus modified, which accrued before and to July 1, 1861, was fully paid; but the rent accruing from and after that date remained unpaid.

In 1864, the plaintiffs brought an action in the circuit court for Cook county, in the state of Illinois, against Eldreds & Balcom, to recover the rent to April 1, 1863, reserved in the original lease to Grey, claiming that the firm had rendered itself liable to pay the larger rent by failure to comply with the conditions of the agreement of March, 1860, reducing the rent. Balcom was not served with process in that action, and Elisha Eldred made default therein. The defendant *Anson Eldred* appeared to the action, and interposed three pleas to the declaration, one of which was *actio non* as to the rent and taxes accruing after March 31, 1862, for that on the 20th day of January, 1862, "the defendants did vacate, abandon and to the plaintiffs surrender the premises in said first count of said declaration mentioned, and every part thereof; and that afterwards, to wit, on the 1st of April, 1862, the plaintiffs accepted said surrender of said premises, entered into and resumed possession thereof, and from the time of such entry thence forward to the first day of April, 1863, had and continued to hold such possession, whereby the defendants became and were discharged and released from all liability and obligation to pay any rent, taxes or assessments for, upon or on account

Stowell and others vs. Eldred.

of said premises, not due and payable at the time of such entry by the plaintiffs as aforesaid."

That action was tried in March, 1866, and resulted in a judgment against the defendants, on the basis of the Grey lease as modified, for \$11,666. Of this sum a little more than \$6,500 was for the rent (including taxes and assessments) and the interest thereon, accruing from April 1, 1862, to April 1, 1863.

The present action was brought upon such judgment, and it is alleged in the complaint (which is in the usual form of complaints on foreign judgments), that no part thereof has been paid.

The answer of the defendant *Anson Eldred* (upon whom alone the summons in the action was served) contains a defense at law, and an equitable counterclaim. The legal defense is, that said defendant, through his agent, one James Farr, Jr., paid the plaintiff upon such judgment the sum of \$4,100, as follows: \$2,000 on the 12th of July, 1867; \$600 on the 7th of October, and \$1,500 on the 2d of November, in the same year; such payment of \$2,000 having been made in a corporate bond of Kansas City for \$1,000, and a like amount of the stock of the Young Men's Christian Association of Chicago; that all these payments were made by Farr under a written agreement between him and the plaintiff for the purchase by and assignment to him of such judgment; that Farr made such agreement as the agent and for the benefit of the defendant; and the money and property with which Farr made such payments belonged to, and the payments were in fact made by, the defendant.

The equitable counterclaim in the answer goes to the validity of that portion of the judgment which is for the rents, taxes, etc., for the year ending April 1, 1863. The case was before this court on a former occasion on a demurrer to such counterclaim, and is reported in 26 Wis., 504. A sufficient statement of such counterclaim will be there found in

Stowell and others vs. Eldred.

the opinion by Mr. Justice COLE, which should be read herewith.

The written agreement between the plaintiffs of the first part and Farr of the second part, above mentioned, after describing the judgment and reciting that there is due upon it about \$12,600, and that Farr desires to purchase it, proceeds as follows:

“Now, therefore, this agreement witnesseth, that the said parties of the first part, in consideration of the money to be paid and covenants to be performed by said second party as hereinafter stated, do hereby agree that upon the full payment of the several sums of money hereinafter mentioned, and full performance of the covenants hereinafter mentioned to be performed by the said party of the second part, they, the said parties of the first part, will assign, transfer and set over unto the said party of the second part, all their right, title and interest in and to said judgment and the money due thereon. In consideration of which, the said party of the second part agrees to pay to the said first parties the sum of twelve thousand six hundred dollars, in the manner following, that is to say: one thousand dollars in Kansas City bonds, and one thousand dollars of the stock of the Young Men’s Christian Association Building, the receipt whereof by said first parties is hereby acknowledged and the said second party forever released and discharged therefrom; thirty-six hundred dollars worth of lumber, to be delivered at Chicago, in the month of September, 1867, said lumber to be mill run, from the mill of said second party at Stiles or Muskegon, at the option of said second party, and is to be delivered and turned over to said first parties at the market price of the same kind and quality of lumber in Chicago at the time of the delivery of the same; thirty-five hundred dollars on September 1, 1868; and thirty-five hundred dollars on September 1, 1869; which said two last mentioned sums of money are secured to be paid by two certain promissory notes of said second party,

Stowell and others vs. Eldred.

of even date herewith, for the sum of thirty-five hundred dollars each, payable to the order of *Samuel R. Haven*, on the 1st day of September, 1868 and 1869, respectively, with interest at seven per cent. per annum, payable annually.

"It is mutually agreed and understood by and between the parties hereto, that as soon as the above sums of money shall have been fully paid in manner aforesaid, said judgment shall be assigned, transferred and set over to said second party; but nothing herein shall be held or construed as a present assignment of said judgments, or to have the affect to assign, transfer or set over to said second party said judgment or any right, title or interest in and to the same, until said several sums of money above mentioned shall have been fully paid by said second party in manner aforesaid.

"It is further mutually understood and agreed, that in case the said second party shall fail to pay the money, and keep his covenants herein contained, according to the terms of this agreement, that then and in that event the said parties of the first part may, at their option, declare this agreement null and void, and thereupon all money paid under this agreement shall be forfeited by said second party."

This agreement bears date July 12, 1867, and is executed under seal by each party thereto. It was subsequently modified so that, instead of delivering the lumber therein mentioned, Farr paid \$600 in cash, and gave his two promissory notes on short time for \$1,500 each, one of which he paid in November, 1867, and the other remains unpaid. The two notes for \$3,500 mentioned in the agreement were given by Farr to the plaintiffs, and no part of them has been paid. These unpaid notes were not surrendered to Farr, and it does not appear that any offer to surrender them was made until the trial of this action.

Under date of January 14, 1868, Messrs. Walker & Dexter, attorneys residing in Chicago, addressed a communication to Farr on behalf of the plaintiffs, declaring the above agree-

ment and all payments made thereon forfeited, because of his failure to make the payments provided for therein. No mention of the outstanding notes of Farr is made in that communication.

The circuit court found as facts, that in making such agreement Farr acted as the agent of the defendant *Anson Eldred*, at his request and for his use and benefit; that in making such payments thereon Farr also acted as his agent, and "that the money and property with which said payments were made, belonged to the said *Anson Eldred* at the time they were so used, and that said payments so made by the said James Farr, Jr., to said plaintiffs were in fact made by said *Anson Eldred* to said plaintiffs upon said judgment."

A statement of the testimony in support of the equitable counterclaim in the answer will be found in the opinion. The court found that such counterclaim was proved, and held that it was available to reduce the judgment in suit \$6,503.84, leaving that judgment valid for the sum of \$5,176.96 only. The court also held that the payments made by Farr on his agreement with the plaintiffs should be allowed to the defendant as payments on the judgment. Upon the foregoing basis the court stated an account, and found that there was equitably due the plaintiffs on the Illinois judgment, at the date of the finding (May 6, 1875), the sum of \$2,245.82, and no more. If the correct basis was adopted by the court, the accuracy of the computation is not questioned.

The circuit court also held that upon payment by him of the sum last above mentioned into court, together with interest thereon from that date to the date of payment, for the use of the plaintiffs, the judgment in suit "should be declared fully paid, satisfied and discharged as to the defendant *Anson Eldred*, and said plaintiffs should be perpetually restrained and enjoined from collecting, or in any manner enforcing, said judgment against the said defendant *Anson Eldred*, for any sum whatsoever."

Stowell and others vs. Eldred.

Anson Eldred thereupon paid into court the required sum, and judgment was rendered in his favor in accordance with the above conclusion of law, and against him for the costs of the action.

The plaintiffs appealed from the whole of such judgment, except that portion which awards costs against the defendant.

L. S. Dixon, for appellants:

1. The court erred in admitting the contract between plaintiffs and Farr, and parol evidence that *Eldred*, instead of Farr, was the real party to it. Such evidence contradicted the writing. *Lincoln v. Crandell*, 21 Wend., 101; *Becker v. Lamont*, 13 How. Pr., 24; *Chappell v. Dann*, 21 Barb., 17; *Auburn City Bank v. Leonard*, 40 id., 119; *Galusha v. Hitchcock*, 29 id., 193; *Evans v. Wells*, 22 Wend., 324; *Newcomb v. Clark*, 1 Denio, 229; *Fenly v. Steward*, 5 Sandf., 101; *Arfridson v. Ladd*, 12 Mass., 173; *Stackpole v. Arnold*, 11 id., 27; *Williams v. Christie*, 4 Duer, 29; *Higgins v. Senior*, 8 Mees. & W., 834. Even those cases which recognize the right to vary the terms of a written contract by parol evidence that a party to it acted as an agent merely, except the cases of *contracts under seal*. *Sims v. Bond*, 5 B. & Ad., 393; *Lerned v. Johns*, 9 Allen, 421; *N. J. Steam Navigation Co. v. Merchants' Bank*, 6 How., 344; *New England Ins. Co. v. De Wolf*, 8 Pick., 61; *Rice v. Gove*, 22 id., 158. 2. The evidence does not show that, as to the plaintiffs, Farr was acting as the agent of *Eldred*, or that the payments were made with *Eldred's* property. It is conceded that *Eldred* was largely indebted to the plaintiffs and others, and that, for the purpose of concealing his property from those creditors who might be disposed to seize it for the collection of their debts, he had transferred it all to Farr, and was doing all his business in Farr's name. As to all the world except creditors of *Eldred* who might elect to treat it as his property, and *bona fide* purchasers, the property was Farr's. *Fargo v. Ladd*, 6 Wis., 106-117; *Clapp v. Tirrell*, 20 Pick., 247; *Hawes v. Leader*,

Stowell and others vs. Eldred.

Cro. Jac., 270; *Osborn v. Moss*, 7 Johns., 161; *Jackson v. Garnsey*, 16 id., 189; *Drinkwater v. Drinkwater*, 4 Mass., 354; *Fairbanks v. Blockington*, 9 Pick., 93; *Clemens v. Clemens*, 28 Wis., 637. Had Farr obtained an assignment of the judgment, paying for it out of this property or its proceeds, it would have been a valid judgment in his hands or the hands of his creditors, against *Eldred*. The property becoming absolutely Farr's, it becomes at once subject to his debts. *Den v. Monjoy*, 2 Halstead, 173; *Douglas v. Dunlap*, 10 Ohio, 162. And a voluntary reconveyance of it to *Eldred* would be fraudulent as to Farr's creditors. *Chapin v. Pease*, 10 Conn., 69. After the contract was entered into, the plaintiffs occupied the double position of creditor of Farr and purchaser from him. Any one liable upon a contract, express or implied, is a debtor. 1 Am. L. C., 75; *Sargent v. Salmond*, 27 Me., 539, 543; *Carlisle v. Rich*, 8 N. H., 44; *Seward v. Jackson*, 8 Cow., 407. 3. In any event, *Eldred* can only assume the contract subject to all the rights that the plaintiffs could have exercised against Farr, had he been the real principal. 2 Smith's L. C., 227; *Sims v. Bond*, 5 B. & Ad., 393; 8 M. & W., 834; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.), 344. But, under the contract, the party failing to perform could have no rights *at law*. He could not recover the money actually paid, even though this forfeiture clause had not been inserted. *Edgerton v. Peckham*, 11 Paige, 364; *Haynes v. Hart*, 42 Barb., 58; *Green v. Green*, 9 Cow., 46; *Ketchum v. Evertson*, 13 Johns., 364; *Hudson v. Swift*, 20 id., 26; *Hasbrough v. Peck*, 5 Wall., 497. And if the amount could not be recovered by either Farr or *Eldred* from the plaintiffs in an action brought for that purpose, it cannot be *offset* in this action. *Kingston Bank v. Gay*, 19 Barb., 459. Neither do the facts show any ground for equitable relief from the failure to perform the conditions precedent. Courts of equity do not relieve against the nonperformance of conditions precedent. *Witts v. Smith*, 2 Edw., 78; *Rogan v. Walker*, 1 Wis., 527.

Stowell and others vs. Eldred.

The parties having made time of the essence of the contract, they cannot be relieved in a court of equity on the ground that such was not their intention. *Benedict v. Lynch*, 1 Johns. Ch., 370. Moreover, if equity would relieve against the forfeiture here, the party in default must first tender payment of the balance *due on the contract*; and his only remedy is by *bill for specific performance*. 4. Viewing the contract as one between plaintiffs and defendant, and the money and other property paid thereon by Farr as belonging to the defendant, it may be said that we have \$4,100 of defendant's property for which he has received no consideration. But (1) such a claim might be made by any party who has partly performed and then abandoned his contract. We hold the property according to the terms of the contract. (2) There was a full and ample consideration for the agreement. By means of this contract, a seizure of the property, and consequent exposure of the cover held over it, was prevented; the time of payment was materially extended, some of it for twenty-six months; a large portion of the amount due was to be paid in property instead of money; and *Anson Eldred* was enabled to keep the judgment alive against Elisha Eldred, the other judgment debtor, who is *prima facie* liable for half the amount; while the plaintiffs lost the right to enforce collection of the judgment against Elisha Eldred. 5. As to the equitable counterclaim, there is nothing in the former opinion of this court in this case (26 Wis., 507) infringing or modifying the rule that a court of equity will not relieve against a judgment at law on the ground that it is wrong, even though the new evidence may be of such a character as to put the question beyond a doubt (*Mason v. Palmer*, 2 Ind., 117; *Marriot v. Hampton*, 7 D. & E., 269; *Young v. Keighley*, 16 Vesey Jr., 349; *Driscoll v. Dampf*, 17 Wis., 419); not even where the witness upon whose testimony the judgment was obtained, is shown to have been mistaken, or willfully to have sworn falsely. *Smith v. Lowry*, 1 Johns. Ch., 320;

Stowell and others vs. Eldred.

Vaughn v. Johnson, 1 Stockt. Ch., 178; 16 Iowa, 310; 20 id., 481. It is the duty of a party to know what his witnesses will swear to. *Williams v. Lockwood*, 1 Clarke's Ch., 172. 6. Counsel argued that the evidence failed to show any fraudulent concealment of evidence by the plaintiffs, or that *Dr. Haven* intentionally swore falsely in reference to any fact within his knowledge; and that the defendant had been guilty of laches in not applying to the court in which the judgment was rendered for a new trial. 2 Story's Eq. Jur., § 895.

F. C. Winkler and *A. L. Cary*, for respondent:

1. Plaintiff's exceptions to the findings of the court were not made a part of the bill of exceptions, and cannot be considered by this court. Secs. 13, 14, ch. 264, Laws of 1860; sec. 1, ch. 36, Laws of 1872; *Merwin v. O'Day*, 9 Wis., 156; *Hunt v. Bloomer*, 13 N. Y., 341; *Dougherty v. North Wis. R'y Co.*, 36 Wis., 402; *Gilbank v. Stephenson*, 30 id., 155; *Jenkins v. Esterly*, 22 id., 128. Hence, the only question to be determined by this court is, whether the judgment is sustained by the pleadings and the findings of the court. *Wisconsin Improvement Co. v. Lyons*, 30 Wis., 61; *Blossom v. Ferguson*, 13 id., 75; *Brant v. Salisbury*, 23 id., 515. 2. The payments made by Farr were properly applied in part satisfaction of the judgment. Where an agent makes a contract in his own name, without disclosing his principal, the principal is entitled to the benefit of the contract, and may sue or be sued thereon, although the agent may also be liable. *Taintor v. Prendergast*, 3 Hill, 72; *Huntington v. Knox*, 7 Cush., 371; *Higgins v. Senior*, 8 Mees. & Wels., 840; Story on Agency, § 410. The forfeiture clause in the contract must be regarded as a penalty and not as liquidated damages. The agreement on the part of Farr was for the payment of money merely, and the doctrine of liquidated damages is not applicable to that class of agreements. *Fitzpatrick v. Cottingham*, 14 Wis., 219. 3. A judgment of another state, if sued upon here, may be reëxamined and relieved against to the same ex-

Stowell and others vs. Eldred.

tent as if sued upon in the courts of the state where recovered. *Brown v. Parker*, 28 Wis., 21; *Stowell v. Eldred*, 26 id., 504. 4. An actual surrender of possession of the premises by the lessee to the lessor, and a leasing of them by the latter to a third party, will have the effect of a surrender of the lease. *Witman v. Watry*, 31 Wis., 638. The ratification of Schofield's acts by the plaintiffs was equivalent to a previous express authority. *Ballston Spa Bank v. Marine Bank*, 16 Wis., 120. Counsel further argued that the allegations contained in the equitable counterclaim were proved by the evidence.

LYON, J. I. It is earnestly argued by the learned counsel for the plaintiffs, that the defendant *Anson Eldred* can derive no benefit from the payments made by Farr on his agreement with the plaintiffs for the purchase of the Illinois judgment, notwithstanding such agreement was in fact made by Farr as the agent of *Eldred*, for him and at his request, and such payments thereon were made with the money and property of *Eldred*. The argument is based upon the facts that the agreement is a sealed instrument, and that it does not appear on its face that *Eldred* had any interest in it. To sustain the position, the counsel invoke two familiar rules of law: 1. That the terms of a written contract cannot be changed by parol evidence; and 2. That a contract under seal executed by an agent in his own name, does not bind the principal not named therein, but it in whose behalf the contract was in fact made, nor does it confer any rights upon such principal. Story on Agency, § 160. So many exceptions to the last rule have been made in modern times by the courts, that the rule seems to operate at the present time within quite narrow limits. One of these exceptions, sanctioned by reason and authority, is, that if the instrument would be valid without a seal, then, although executed under seal, it is to be treated as written evidence of a simple contract, and the seal adds nothing to it. Opinion of Senator VERPLANCK in *Evans v. Wells*, 22 Wend.,

Stowell and others vs. Eldred.

341. That the agreement between Farr and the plaintiffs would have been equally valid and binding upon the parties had it not been executed under seal, will not be denied. Hence it comes within the exception to the rule last above stated.

Neither is it a violation of the rule which prohibits the changing of the terms of written contracts by parol evidence, to permit the defendant *Anson Eldred* to avail himself of the benefits of the agreement made for him by Farr for the purchase of the Illinois judgment. It is not sought to deprive any party to that agreement of any right, or to relieve any party thereto from any liability given or imposed by that instrument, but only to show that a person not a party thereto has rights under it because it was entered into for his benefit. It is no more a violation of the rule under consideration to permit *Anson Eldred* to do this, than it would be to sustain an action on the instrument brought by a person to whom Farr had assigned his rights under it. The true significance of the rule as applied to this case is, that Farr cannot relieve himself from liability to the plaintiffs under his agreement with them, by showing that he made the agreement merely as the agent of *Eldred* and for him, nor can the plaintiffs, by like proof, relieve themselves from liability to Farr. But the rule will not prevent *Eldred* from asserting and enforcing the same rights that Farr has under the agreement, or the plaintiffs from asserting and enforcing the liability of *Eldred* thereunder, coëxtensive with that of Farr. The rule of law which is believed to be applicable to this case is thus stated by Judge STORY in his work on Agency: "If the agent possesses due authority to make a written contract, not under seal, and he makes it in his own name, whether he describes himself to be an agent or not, or whether the principal be known or unknown, he, the agent, will be liable to be sued, and be entitled to sue thereon, and his principal also will be liable to be sued, and be entitled to sue thereon in all cases, unless from the at-

Stowell and others vs. Eldred.

tendant circumstances, it is clearly manifested that an exclusive credit is given to the agent, and it is intended by both parties that no resort shall in any event be had by or against the principal, upon it." § 160 a. There is nothing in the agreement under consideration, or in the attendant circumstances, manifesting an intention by the parties thus to exclude *Eldred* from benefit or liability under it. This doctrine is fully sustained by numerous adjudged cases, many of which are cited in the notes to the text, from which the above quotation is made. It is abundantly proved that Farr entered into the agreement with the plaintiffs for the purchase and assignment of the Illinois judgment, for and on behalf of *Anson Eldred* and for his use and benefit. In the light of the principles above stated, it must be held that the latter may avail himself of the benefits of that agreement.

It must be further held that his rights are coëxtensive with those which Farr would have, were he in court seeking to compel the plaintiffs to perform the agreement on their part.

We do not mean that *Eldred* must be confined literally to the relief to which Farr would be entitled—but he must be substantially confined to it. The fact that the judgment, which is the subject matter of the agreement, is against *Eldred*, may render necessary a change in the form of the relief, if relief be granted. For example, if Farr would be entitled to an assignment of the judgment should he prevail in an action brought by him against the plaintiffs to enforce specific performance of the agreement, in a like action by *Eldred* he might be entitled to a discharge of the judgment, or to an injunction restraining the collection of it; for it is quite immaterial to the plaintiffs whether they assign or discharge, and the difference between the two modes of relief is unimportant and formal. Neither do we mean to say that *Anson Eldred* may not, in this action, enforce his equitable counterclaim; for that is a matter entirely independent of such agreement.

We are not to consider and determine what the rights of

Farr would be under the agreement, were he seeking to enforce them.

In 1868, the plaintiffs attempted to exercise the option given them in the agreement, to declare the same void and to secure the forfeiture of the payments theretofore made on it by Farr. This they could not do effectually without an offer to surrender to Farr the outstanding notes which he had given them in part execution of the agreement; and they made no such offer. Hence there has been no sufficient exercise of such option, and, consequently, no forfeiture of the payments made by Farr on the agreement. We are not called upon to determine, and do not here determine, whether or not a court of equity would relieve against such forfeiture, had the plaintiffs, with the attempted exercise of such option in 1868, surrendered or offered to surrender to Farr such outstanding notes.

As the case stands upon the proofs, until *Anson Eldred* asserted his rights under the agreement, as principal, Farr could have maintained an action against the plaintiffs to compel a specific performance of the agreement, upon tendering or offering payment of the balance due thereon. Specific performance in such case would be an assignment to Farr of the Illinois judgment. Inasmuch as Farr would take such assignment as the agent and for the use and benefit of *Anson Eldred*, who paid the consideration therefor, aside from any question of fraud, such specific performance would be equivalent to a discharge of the judgment.

When this action was commenced, *Anson Eldred* had the same right to enforce specific performance of the agreement on the same terms and conditions; and in such case the appropriate specific performance is the equivalent of assignment to Farr, to wit, the discharge of the judgment, or a decree declaring the judgment fully paid and satisfied.

But such relief, whether at the suit of Farr or of *Anson Eldred*, can only be obtained in a court of equity. Hence,

Stowell and others vs. Eldred.

while it is competent for *Eldred* to obtain such relief in this action, he can only obtain it by pleading a counterclaim in the nature of a bill in equity for a specific performance of the agreement.

The payments made by Farr on the agreement are pleaded as payments on the Illinois judgment; but they are not payments on the judgment, and are not available as a legal defense to an action thereon.

It was argued at the bar that there is enough in such plea of payment to constitute it a counterclaim. But we think otherwise. The answer in that behalf avers payment by Farr of \$4,100 on the judgment, and claims that the amount should be allowed as such. This is no counterclaim, much less is it an equitable counterclaim, but only a legal defense to a part of the plaintiffs' claim. The issue upon it would be triable by a jury. As such defense, it is not available in this action. The testimony introduced under it, and received under objection, failed entirely to show that those payments were made on the judgment; and under the pleadings as they are, the testimony should have been rejected.

On former occasions this court has had under consideration answers containing averments of fact so pleaded that it was doubtful whether counterclaims were predicated upon them, or whether they were alleged merely as defenses; and by argument and the application of various tests, the court has determined the character of these pleadings. Should it be asserted that there is an inconsistency in those decisions, we are not prepared to dispute the assertion. The rule on this subject should be certain and uniform. In order that it may be so in the future, we take this occasion to say that hereafter no averment in an answer will be held to constitute a counterclaim, unless it is so denominated and the appropriate relief prayed. Wanting these requisites, the pleading will be held to be a defense only. It is so easy to commence a counterclaim by denominating it a counterclaim, and to close it with a demand

Stowell and others vs. Eldred.

for relief, that it is not unreasonable, and does no violence to the spirit of the code, to require the pleader to do so.

The judgment herein is substantially a judgment in equity for the specific performance, by the plaintiffs, of their agreement with Farr. The action is an action at law, and we have seen that the portion of the answer under consideration, and upon which the judgment is founded in part, is merely a legal defense. Hence there are no sufficient pleadings to support the judgment. The variance between a mere legal defense of payment, and an equitable counterclaim for specific performance, is material and vital; and it cannot be disregarded, or cured by summary amendment of the answer on the trial.

II. Although the views above expressed must necessarily result in the reversal of the judgment, yet, for the purpose of giving the proper directions to the circuit court, it is necessary to consider that portion of the judgment which relates to the equitable counterclaim in the answer.

It appears from the evidence that the plaintiffs *Samuel R. Haven* and *Jane S. Haven*, his wife, have resided for many years in the city of Chicago, and that all the other plaintiffs, during the time covered by the transactions involved in this litigation, resided, and still reside, in the state of Massachusetts; that *Samuel R. Haven* (who is referred to in the bill of exceptions as *Dr. Haven*) had the sole charge of the premises described in the Grey lease, renting the same and collecting the rents, from the time that lease was executed until the spring of 1861, when he entered the army as a surgeon and remained therein until the spring or summer of 1863; and that during that period he was almost constantly absent from Chicago. On leaving Chicago, in 1861, *Dr. Haven* appointed one Schofield his agent to transact all his business in that city during his absence, and delivered to him all his papers relating to the Stowell property leased to Grey, but which property was then occupied by Eldreds & Balcom.

In January, 1862, Eldreds & Balcom abandoned the leased

Stowell and others vs. Eldred.

property, notified Schofield of the fact, and surrendered or offered to surrender the same to him for the plaintiffs. Thereupon, in March, 1862, the plaintiff *Mary A. Stowell*, who owned or represented an undivided seven-ninths of the property, gave Schofield a formal power of attorney duly authorizing him to relet the same; the plaintiff *George W. Johnson*, who represented one-ninth of the property, wrote to Schofield telling him to use his best discretion in leasing the property, and giving him certain directions as to terms of lease; and *Dr. Haven*, who represented the other one-ninth interest, wrote to Schofield from Virginia, telling him to do as he thought best in the matter. It is certain that all of the above named plaintiffs knew, at the time they so acted or wrote, that the property was vacant, and that Eldreds & Balcom were endeavoring to surrender their lease.

Armed with such ample authority to do so, Schofield, on the 24th of March, 1862, leased the property to the firm of Pearson & Avery for one year from May 1, 1862, at the rent of \$2,500 per year, and said lessees entered into possession thereof April 1, 1862. Under date of March 30th, in the same year, and no doubt in answer to a letter from Schofield informing him that the property had been leased to Pearson & Avery, *Johnson* wrote to Schofield that he was glad to hear that the property was rented to a responsible man, and that the rent for the first quarter had been paid.

Schofield collected the rent for two quarters of Pearson & Avery, and accounted therefor to the plaintiffs. Under date of October 23, 1862, he remitted to *Johnson* a draft for \$606.25, with statement showing it to have been received for rent of the property leased to Pearson & Avery; and five days later, *Johnson* acknowledged by letter the receipt of the draft.

Schofield having ceased to act as the agent of the plaintiffs, one Ingalls collected the rent of Pearson & Avery for the third quarter, and paid over or accounted for the same to *Dr. Haven*, who, for himself and all the other plaintiffs, re-

Stowell and others vs. Eldred.

ceipted to him therefor. This receipt is defectively dated, but was doubtless given May 1, 1863, at which time *Dr. Haven* was temporarily in Chicago. On the same day (May 1, 1863) *Dr. Haven* in person collected the rent of Pearson & Avery for the fourth quarter, ending on that day.

After the action was brought against Eldreds & Balcom, in 1864, in the Cook county circuit court, the defendant *Anson Eldred* made reasonable and diligent efforts to find Schofield (who left Chicago in 1862), for the purpose of obtaining his testimony, which, had it been obtained, would have proved or tended to prove *Eldred's* defense in that action as to the rent accruing after April 1, 1862. Those efforts were unsuccessful. *Dr. Haven* was the only plaintiff in that action who was present at the trial thereof. *Eldred* called him as a witness to prove such defense, and he was duly sworn and examined in that behalf. But, instead of testifying to the facts as he knew them to be, or, at least, as he had recently known them to be, he denied that he authorized Schofield to act for the Stowell estate in respect to the property leased to Grey and occupied by Eldreds & Balcom; he denied all knowledge of the lease to Pearson & Avery; he denied that he had ever received a dollar of rent accruing under that lease to his knowledge; he denied knowledge that any of the plaintiffs ever received any such rent, or knew of the existence of the lease; and, in brief, he denied more or less positively all knowledge of the existence of any and every fact material and essential to such defense. Having no other testimony at hand to prove the same, of course *Eldred* failed to establish his defense, and judgment went against him for \$6,500 more than plaintiffs would have recovered had *Dr. Haven* testified to the facts as they were. The foregoing facts are substantially stated in the answer, and in the findings of the court.

It would seem from the above statement that the case is a proper one for equitable relief, within the rule laid down on the former appeal (26 Wis., 504). It is claimed, however,

Stowell and others vs. Eldred.

that the case is not not within that rule, for the alleged reason that *Dr. Haven* did not commit perjury in his testimony on the trial of the Illinois suit, but that he had forgotten the facts, and testified honestly, though inaccurately. The answer to this position is, that *Dr. Haven*, knowing all the facts essential to *Eldred's* defense in that suit, ought not to have forgotten them when a little honest effort in that direction would have brought them within his recollection. He and his coplaintiffs cannot be heard in a court of equity to assert such forgetfulness, and thereby compel *Anson Eldred* to pay them many thousands of dollars more than in equity and justice he owes them.

The propriety and reasonableness of these views will be more apparent if we look for a moment at a single aspect of the case, and there are others equally significant. In 1863, *Dr. Haven*, in person, collected \$625 in cash of Pearson & Avery, for rent accruing under their lease of the property theretofore held by Eldreds & Balcom under the Grey lease. At the same time he received the account of Ingalls, the agent of the plaintiffs, and receipted to him for a like amount of rent collected by Ingalls of Pearson & Avery on the same lease.

Proof of these transactions on the trial would have reduced the judgment in suit \$6,500. *Dr. Haven*, on being called as a witness to make such proof, testified that he never received a dollar of rent accruing under the Pearson & Avery lease, to his knowledge. Such testimony was given within less than three years after he received in person a large sum of money, and audited the account of Ingalls for another large sum (amounting in all to \$1,250), all of which accrued under that lease. Because *Dr. Haven* so testified, the judgment in suit is for \$6,500 more than it would have been had he testified that he received the rent. What manner of equity would that be which would permit him and his coplaintiffs to enforce payment of that portion of the judgment?

Let us look for a moment at another aspect of the case.

The Illinois suit was commenced in 1864. At that time every one of the plaintiffs knew that Eldreds & Balcom were not legally liable for any rent accruing on the Grey lease after April 1, 1862. That action was brought too recently after the transactions above narrated to leave any room for the plea of forgetfulness. Yet the plaintiffs sought in that suit to recover, and, by means of the alleged forgetfulness of facts by one of their number, did recover, thousands of dollars of rent accruing after that date.

The plaintiffs seek to recover the full amount of the Illinois judgment, principal and interest, less \$2,500 received of Pearson & Avery, which they now offer to allow thereon. To permit them, under all of the circumstances of the case, to do so, would be to permit the defendants to be grossly wronged; and to hold that a court of equity is powerless to prevent such wrong from being consummated, would be to restrict the powers of that court to relieve against fraud and injustice, within limits altogether too narrow.

Were *Dr. Haven* on trial for perjury assigned upon his testimony in the Illinois suit, he might allege forgetfulness of the fact to disprove criminal intent; but the plaintiffs ought not to be heard to allege such forgetfulness by one of their number to enable them to recover of *Anson Eldred* several thousands of dollars more than in justice and equity they ought to recover.

Our conclusions are, that to entitle the defendant *Anson Eldred* to recover on his equitable counterclaim, it is sufficient that he has proved: 1. That when the Illinois suit was brought, the plaintiffs knew they had no valid claim against Eldreds & Balcom for rent accruing after April 1, 1862; 2. That *Dr. Haven*, when examined as a witness on the trial of that suit, denied knowledge of facts which were within his knowledge, and which he ought to have recollected, and which, had they been proved, would have prevented a recovery for rent accruing after that date; and, 3. That he, the said

Bass vs. The Chicago & Northwestern Railway Company.

Anson Eldred, is not chargeable with laches in that action, in respect to his defense thereof.

The portion of the judgment of the circuit court appealed from must be reversed, and the cause remanded with directions to that court to permit the defendant *Anson Eldred* to amend his answer by inserting therein another equitable counterclaim founded on the contract between Farr and the plaintiffs, and the payment of money into court as stated in the judgment. The nature of such counterclaim has already been sufficiently indicated. If the amendment be made within such reasonable time as the court shall direct, a new trial is awarded. Otherwise, judgment must be entered for the plaintiffs for the Chicago judgment less \$6,503.84, and interest on the balance at six per cent. from the time the judgment was rendered.

By the Court. — Ordered accordingly.

BASS VS. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY.

EXCESSIVE DAMAGES: COMPENSATORY AND EXEMPLARY DAMAGES. (1,2) *Setting aside verdict for excessive damages.* (3) *Case stated; damages for personal injuries held excessive.* (4) *Effect of former verdict for same sum.* (5) *Exemplary damages, when allowable.* (6) *When verdict must be treated as for compensatory damages only.*

1. The circuit courts of this state have the power, and it is their duty, to set aside verdicts awarding excessive damages.
2. Verdicts are not to be set aside as excessive merely because the court would be better satisfied if the damages were assessed at a less sum, but only when it is clear that they are materially greater than the evidence will justify.
3. In this case the jury might have found from the evidence that the plaintiff, as a passenger on defendant's train, being unable to find a seat elsewhere, except in a filthy smoking car, peaceably and lawfully, and without being forbidden, entered the ladies' car, in which there were many

Bass vs. The Chicago & Northwestern Railway Company.

vacant seats, and, when about to occupy one of these, without having been first requested to leave the car, was rudely and violently seized by the defendant's brakeman, and forcibly thrust from the car to the platform; that the train was then crossing a river, though, from the construction of the platform, the peril to plaintiff from that circumstance was slight; that the assault was committed in the presence of a number of ladies and gentlemen; that plaintiff's cane, and a ring on one of his fingers, were broken, and the broken ring cut the finger to the bone, making a ragged wound; that the back of one of his hands was lacerated or bruised so that blood flowed from the wound; and that one arm was somewhat bruised, and showed extravasation for three weeks thereafter. Under instructions which did not allow *exemplary* damages, plaintiff had a verdict and judgment for \$4,500. *Held*, excessive.

4. The fact that on a former trial of the cause the jury awarded the same amount of damages, has no force to sustain the present verdict, it appearing that the jury were permitted by the court on such former trial to award *exemplary* damages.
5. There was evidence on the present trial tending to show that after defendant had notice that its brakeman had committed the injuries complained of, it retained him in its service, and promoted him to a position of greater responsibility. *Held*, that if this was done with knowledge of the manner and circumstances of the assault alleged in the complaint, it might be such a ratification of the brakeman's acts as to authorize the jury, in its discretion, to award *exemplary* damages; and they should have been so instructed.
6. But, no such instruction having been given, the verdict must be treated as one for compensatory damages only, and must be set aside as excessive.

APPEAL from the Circuit Court for *Rock* County.

This case was before this court on a former appeal; and in the report thereof, in 36 Wis., 450, will be found a statement of the pleadings, and also of the testimony given on the first trial of the action. On that appeal, the judgment for the plaintiff was reversed for error in the instructions given to the jury; and the cause was again tried. The testimony on the last trial was substantially a repetition of that given on the former trial. To the statement of the case on the former appeal (which will not here be repeated), it is only necessary to add that the complaint contains the averment, not denied in the answer, that the plaintiff is, by profession, an attorney-at-law; and that it was proved on the trial that

Bass vs. The Chicago & Northwestern Railway Company.

because of weakness of his ankles, he has been lame in both feet from his childhood, so that in walking he is obliged to use a cane, and is unable without support to bear his weight on either foot; also, that by reason of a fracture of his left arm near the elbow, which fracture was never reduced, he has but little use of that arm.

The circuit judge instructed the jury, *inter alia*, that if the plaintiff was entitled to recover, he could only recover compensatory damages. The jury found for the plaintiff, and assessed his damages at \$4,500. A motion for a new trial was denied, and judgment was entered pursuant to the verdict. One of the grounds assigned in support of the motion for a new trial was, that the jury awarded excessive damages.

The defendant appealed from the judgment.

William Ruger, for appellant, argued, among other things, that the damages were excessive, and a new trial should have been granted for that reason; citing *Craker v. Railway Co.*, 36 Wis., 678; *Canning v. Inhabitants of Williamstown*, 1 Cush., 451; 2 Greenl. Ev., § 267; Sedgwick on Dam. (4th ed.), 31-33, 545; *Wilson v. Young*, 31 Wis., 574; *Day v. Woodruff*, 13 How. (U. S.), 371; *Wade v. Leroy*, 20 id., 34; *Railway Co. v. Sutton*, 53 Ill., 399-400; *Prentice v. Shaw*, 56 Me., 427; *Railway Co. v. Kelley*, 7 Casey, 379; *Lombard v. Chicago*, 4 Biss., 460; *Dressler v. Davis*, 7 Wis., 528; *Fairbanks v. Witter*, 18 id., 287-8; *Pickett v. Crook*, 20 id., 358; *Strahlendorf v. Rosenthal*, 30 id., 675; *Wheeler v. Westport*, id., 392; *Jaguish v. Ithaca*, 36 id., 112-113; *Rogers v. Henry*, 32 id., 327; *Hamlin v. Spaulding*, 27 id., 360; *Bonesteel v. Bonesteel*, 30 id., 512, 516; *City of Ripon v. Bittel*, id., 615-616; *Railway Co. v. Hunter*, 11 id., 160, 164; *Blair v. Railway Co.*, 20 id., 254, 256; *Weisenberg v. Appleton*, 26 id., 56; *Goodno v. Oshkosh*, 28 id., 300; *Spicer v. Railway Co.*, 29 id., 580; *Schmidt v. Railway Co.*, 23 id., 186; *Patten v. Railway Co.*, 32 id., 524, 535, 536; *City of Decatur v. Fisher*, 53 Ill., 407; *Pullman Palace Car v. Reed*, — id.,

 Bass vs. The Chicago & Northwestern Railway Company.

—; *Railway Co. v. Parks*, 18 id., 460; *Railway Co. v. Vanatta*, 21 id., 188; *Peck v. Railway Co.*, 11 N. Y. S. C., 236; *Turner v. Railway Co.*, 34 Cal., 594; *Tarbell v. Railway Co.*, id., 616; *Theobald v. Railway Co.*, 26 Eng. L. & E., 438; *Pearson v. Duane*, 4 Wall., 605.

J. W. Bass and *H. S. Orton*, for respondent:

1. The defendant, by retaining the offending servant in its employ, has ratified his acts, and so made itself liable for exemplary damages. *Craker v. Railway Co.*, 36 Wis., 676.
 2. In respect to compensatory damages, the court below followed the rule laid down in *Craker v. Railway Co.*
 3. The verdict should not be set aside as excessive. Verdicts in such cases will not be set aside by the court unless it is clear that the decision of the jury evinces a mistake in principle, or that they were carried away by passion, corruption or prejudice. *Birchard v. Booth*, 4 Wis., 76; *Duberly v. Gunning*, 4 Term, 651; *Hewlett v. Cruchley*, 5 Taunt., 277; *Craker v. Railway Co.*, *supra*; *Cheno'with v. Hicks*, 5 Ind., 224; *Blanchard v. Morris*, 15 Ill., 35; *Creed v. Fisher*, 26 Eng. L. & E., 384; *Baker v. Briggs*, 8 Pick., 122; *Treanor v. Donahoe*, 9 Cush., 228; *Jacobs v. Bangor*, 4 Shepley, 187; *Lang v. Hopkins*, 10 Ga., 37; *Fish v. Roseberry*, 22 Ill., 288. An appellate court will be slow in granting a new trial on that ground alone, when the court below is satisfied with the verdict. *Tullidge v. Wade*, 3 Wils., 18; *Redshaw v. Brooks*, 2 id., 405; *Huckle v. Money*, id., 205; *Bennett v. Alcott*, 2 Term, 166. A new trial on this ground is rarely granted in cases of personal torts. *Cook v. Hill*, 3 Sandf., 341; *Torre v. Summers*, 2 N. & McC., 267; *Gilbert v. Burtenshaw*, Cowp., 230; *Smith v. Woodfine*, 1 C. B., N. S., 661; *Chambers v. Robinson*, 1 Str., 691; *Clerk v. Udall*, 2 Salk., 649; *Macon R'y v. Winn*, 26 Ga., 250.

LYON, J. It is the law of this state, settled by numerous adjudications of this court, that the circuit courts have the power

Bass vs. The Chicago & Northwestern Railway Company.

and, on proper applications, it is their duty, to set aside verdicts which award excessive damages. If the damages awarded in this case are excessive, the motion for a new trial should have been granted.

Are the damages excessive? Or (stating the question in another form), is the amount awarded by the jury (\$4,500) so far in excess of just compensation to the plaintiff for the injuries he suffered at the hands of defendant's agents and employees, as to render it the duty of the court to set aside the verdict? For, although the court may think that the jury have awarded damages somewhat too liberally, and would be better satisfied had they been assessed at a less sum, still the verdict should not be disturbed unless it is clear that the damages awarded are materially greater than the evidence will justify.

The testimony tends to show, and the jury may properly have found therefrom, that, being unable to find a seat elsewhere, except in a filthy smoking car, the plaintiff peaceably and lawfully entered the ladies' car, in which there were many vacant seats, and, when about to occupy one of these, was rudely and violently seized by the defendant's brakeman, who, aided by a volunteer, forcibly thrust the plaintiff from the car to the platform; that the train was then crossing Fox river in the city of Oshkosh; that the plaintiff was not first requested to leave the car, or forbidden to enter it; that the assault was committed in the presence of a number of ladies and gentlemen; that the plaintiff's cane and a ring on one of his fingers were broken, and the broken ring cut the finger to the bone, making a ragged wound; that the back of one of his hands was lacerated or bruised so that blood flowed from the wound; and that one arm was somewhat bruised, and showed extravasation for three weeks thereafter.

Under the instruction given by the court, the jury could not properly award exemplary damages, and the verdict must necessarily be considered as for compensatory damages only.

Bass vs. The Chicago & Northwestern Railway Company.

The mere bodily injuries which the plaintiff received were transient in their effects and comparatively slight, and manifestly but a very small portion of the damages awarded to him could have been given for those injuries. Neither could any considerable amount of damages have been awarded for personal peril, because it is satisfactorily proved that the platforms of the cars were so constructed that the plaintiff was in little or no danger of falling from the train. The damages must have been given, chiefly, for the mental sufferings of the plaintiff — the vexation and anxiety — the sense of wrong and insult — produced by the acts of the brakeman.

In the case of *Craker v. Railway Co.*, 36 Wis., 657, the plaintiff was a female, and the injury of which she complained, and which she proved, was, that the conductor of the defendant's train of cars on which she was a passenger, committed an indecent and most outrageous assault upon her person. The assault was committed, however, under circumstances, and was followed by circumstances, which limited the liability of the defendant to compensatory damages. Under the rule above stated, we sustained a verdict in that case for \$1,000, but with some hesitation, for we inclined to the opinion that the jury had awarded too liberal damages. True, the bodily injury and perhaps the personal peril were somewhat greater in this case; but the mental suffering of Miss Craker, caused by the gross insult to her womanhood, was certainly as intense as that endured by the plaintiff.

Mental suffering was the principal ground for damages in both cases; and if \$1,000 was a liberal allowance in one case, it must be that \$4,500 is an excessive allowance in the other. But, without regard to the case of *Craker v. Railway Co.*, the damages awarded in this case seem to us to be much above reasonable, even liberal, compensation for all the injuries which the plaintiff suffered.

On the first trial of this action, the plaintiff recovered the same damages, to wit, \$4,500; and this is urged as a reason

Bass vs. The Chicago & Northwestern Railway Company.

why the last recovery should not be disturbed. There would be much force in the position, were it not for the fact that on the first trial the jury were instructed that they might award exemplary damages if they found certain facts to exist which the testimony tended to prove. This instruction will be found in the argument of counsel for the appellant on the former appeal. 36 Wis., 455. Hence, exemplary damages might have been, and doubtless were, awarded on the first trial. The difference between the rule of damages then laid down and that which was given to the jury on the last trial of the cause, is fatal to the argument; for it destroys the effect which might otherwise result from the fact that two juries have awarded the same damages.

But it was further argued by the learned counsel for the plaintiff, that, notwithstanding the court restricted the recovery to actual or compensatory damages, there was sufficient testimony in the case to justify an award of exemplary damages, and that the verdict should be dealt with as though it were a verdict for exemplary as well as compensatory damages.

The testimony tended to prove that after the defendant had notice that its employee had committed the wrongs and injuries complained of, it retained the offending brakeman in its service, and promoted him to a position of greater responsibility. If the defendant did so with knowledge that its brakeman had assaulted the plaintiff and forcibly ejected him from the car in the manner and under the circumstances alleged in the complaint, that might be such a ratification of the act of the brakeman as would have authorized the jury, in its discretion, under proper instructions, to award exemplary damages against the defendant. We think the learned circuit judge should have so instructed the jury. Had he done so, our opinion is that the second recovery of \$4,500 could not properly be disturbed. The difficulty in the way of sustaining such recovery on the present record is, that we cannot know that a jury, with the same proof before it, and acting

Watson vs. Wilcox, impleaded.

under proper instructions, would award \$4,500 damages. We cannot sustain the recovery unless we hold that the plaintiff is absolutely entitled to recover exemplary damages, and that his damages ought not to be assessed at less than \$4,500. We can affirm neither of these propositions.

We are very reluctant to reverse this judgment and thus protract the litigation; for we greatly doubt whether such reversal will result in any benefit to the appellant. But we have no alternative.

By the Court. — The judgment is reversed, and the cause remanded for another trial.

WATSON vs. WILCOX, imp.

NOTICE OF LIS PENDENS. (1, 2) *When notice not vitiated by needless and erroneous additions.*

SUBROGATION. (3) *Who entitled to be subrogated to rights of mortgagee.*

1. In case of a suit in equity to have certain conveyances held for mortgages only, and certain others held void, notice of *lis pendens* was filed, stating the parties and the nature of the suit, enumerating the several conveyances involved, and describing the land conveyed by each conveyance. *Held*, that if the notice had stopped there, it would have been a sufficient compliance with the statute (R. S., ch. 134, sec. 7).
2. The notice, however, adds a conclusion, stating that "the following real estate is intended to be affected" by the action, and thereupon gives a wrong description, substituting, by a clerical error, the word *north* for *south*, and so describes lands not included in said conveyances. *Held*, that this needless and false conclusion does not vitiate the notice. *Spraggon v. McGreer*, 14 Wis., 439, distinguished.
3. One, who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein.

APPEAL from the Circuit Court for *Rock* County.

Watson vs. Wilcox, impleaded.

The case stated in the complaint is substantially as follows: On June 29, 1864, Allen Bates and the defendant George Harvey were in possession, and the apparent owners of certain lands in Rock county, claiming title to a portion of the same by deed, dated August 4, 1860, from Henry Naiden, who had become the owner of the same by foreclosure of a certain mortgage given by the defendant *Wilcox*, dated April 4, 1857; and to the remainder under a tax deed dated September 13, 1861, and a sheriff's deed dated September 27, 1862, which was executed pursuant to a judgment rendered against *Wilcox* while he was the owner of the land. On said 29th of June, Allen Bates conveyed his interest in said lands to the defendant Harriet Harvey, wife of George Harvey. While in possession of the lands in question, Harvey and wife mortgaged them to Sarah Ann Hodson, April 23, 1866, for \$2,500, on which mortgage there was due and unpaid on October 22, 1869, \$1,750. At that time, the Harveys being unable to pay the mortgage, Mrs. Hodson applied to the plaintiff to purchase the same, which he agreed to do; and as they were about to make an assignment of the mortgage, it was suggested that it would be better to have the mortgage canceled, and take a new mortgage from the Harveys, which was agreed to, and thereupon the plaintiff paid to Mrs. Hodson, at the request of the Harveys, \$1,750, and took a new note and mortgage from the Harveys for that sum, and said mortgage was recorded October 23, 1869, and on the same day Mrs. Hodson satisfied of record the mortgage previously executed to her. On October 12, 1869, the defendant *Wilcox* commenced an action in the Rock county circuit court, against Bates and wife and Harvey and wife, to have the deeds from Henry Naiden and the sheriff of Rock county, and the tax deed, above mentioned, declared mortgages to secure Bates and Harvey for advances made by them, and for an accounting, and to have the deed from Bates and wife to Mrs. Harvey declared a voluntary conveyance and void as against *Wilcox*; and on that day a certain notice of *his pen-*

Watson vs. Wilcox, impleaded.

dens was filed. In said action it was finally adjudged that the title to said lands was in *Wilcox*, and that the interest of the Harveys in the premises mortgaged to the plaintiff was a mortgage interest only. It is further alleged that the said deeds were procured to be executed by *Wilcox* for the purpose of hindering his creditors, and that neither the plaintiff nor Mrs. Hodson had any knowledge of the pendency of said action, or that *Wilcox* had any interest in said lands, but when the sum of \$1,750 was advanced, and for a long time afterward, the plaintiff supposed that the Harveys were the legal and equitable owners of the same. Prayer, that the mortgage to the plaintiff be held a valid mortgage as against *Wilcox*, or that the release of the Hodson mortgage be canceled, and that the plaintiff be subrogated to all the rights of Mrs. Hodson under that mortgage, and for judgment of foreclosure under her mortgage. The complaint sets out at length the notice of *lis pendens* above mentioned; but its contents sufficiently appear from the opinion. The defendant *Wilcox* demurred to the complaint as not stating a cause of action; the demurrer was sustained; and plaintiff appealed from the judgment entered thereon.

William Ruger, for appellant:

1. The *lis pendens* is insufficient to charge the plaintiff with notice. If the conditions upon which the right of recording instruments depends are not strictly complied with, or if the record or filing is defective, the law will not presume notice. *N. Y. Life Ins. Co. v. White*, 17 N. Y., 469; *Pringle v. Dunn*, 37 Wis., 449, 464, 466. The rule that a person having knowledge sufficient to put a prudent man on inquiry, is chargeable with all knowledge to which such inquiry would lead, only applies when the information is actual, and not constructive. Story's Eq. Jur. (Redfield's ed.), § 410 a, 399, note 5; *Ely v. Wilcox*, 20 Wis., 580; *Pringle v. Dunn*, 37 id., 464-6; *Frost v. Beekman*, 1 Johns. Ch., 299-300. In this case the *lis pendens* was defective and misleading, and as

 Watson vs. Wilcox, impleaded.

though no notice at all was filed. *Spraggon v. McGreer*, 14 Wis., 439; *Thomson v. Wilcox*, 7 Lans., 376; *Miller v. Sherry*, 2 Wall., 250. Where the notice is not definite and clear, or is conflicting in its statements, it will be construed strictly against the party claiming advantage under it. *Schnee v. Schnee*, 23 Wis., 381-2. *Wilcox* made the conveyance for an unlawful purpose, and it should not be held to be avoided as against the plaintiff on a mere presumption that the latter knew the contents of the defective notice. *Reynolds v. Vilas*, 8 Wis., 481-4, and cases there cited. 2. If the plaintiff failed to acquire a lien upon the land by the mortgage executed to him, the facts stated entitled him to have the discharge of the Hodson mortgage canceled, and to be subrogated to the rights of Mrs. Hodson. *Morgan v. Hammett*, 23 Wis., 30; *Raymond v. Holborn*, id., 57; *Blodgett v. Hitt*, 29 id., 169; *Thorp v. Amos*, 1 Sandf. Ch., 26, 33-4; *McLaughlin v. Daniel*, 8 Dana, 183; *Carpenter v. Ins. Co.*, 16 Pet., 501; *Miller v. Lancaster*, 5 Cold., 522-4; *Towle v. Hoit*, 14 N. H., 61; *Bank v. Dodson*, 9 Smedes & M., 527; 1 Hilliard on Mort., 355, 692; *Ferris v. Crawford*, 2 Denio, 595; *Mount v. Suydam*, 4 Sandf. Ch., 399; *Mathews v. Aiken*, 1 Coms., 595, 599, 601, 604-5; Story's Eq. Jur. (Redfield's ed.), § 567. The plaintiff removed a lien from the land of *Wilcox*, not as a gratuity, but upon the faith of a second mortgage upon the land; and his equities are the same as if he had taken an assignment of the mortgage, and he cannot be held a volunteer in such a sense as to defeat his plain equity. Burrill's Law Dic., "Voluntary;" *Morgan v. Hammett*, 23 Wis., 30; *Raymond v. Holborn*, 23 Wis., 57.

I. C. Sloan, for respondent:

1. The notice, in spite of the faulty description in the closing paragraph, is sufficient to put a purchaser upon inquiry, and, hence, is sufficient to charge him with all the knowledge to which such inquiry, if entered upon, would have led. 2 Sugden on Vend., 290; 4 Kent's Com., 179;

 Watson vs. Wilcox, impleaded.

Greene v. Slayter, 5 Johns. Ch., 38; *Pitney v. Leonard*, 1 Paige, 461; *Pendleton v. Fay*, 2 id., 202; *Howley v. Cramer*, 4 Cow., 717; *Troup v. Hurlbut*, 10 Barb., 354; *Williamson v. Brown*, 15 N. Y., 354; *Baker v. Bliss*, 39 id., 70; *Howard Insurance Co. v. Halsey*, 4 Sandf., 565; *Parker v. Kane*, 4 Wis., 1; *Lamont v. Stimson*, 5 id., 443; *La Crosse v. Melrose*, 22 id., 459; *Shove v. Larsen*, 22 id., 142; *Fallass v. Pierce*, 30 id., 443; *Peters v. Goodrich*, 3 Conn., 146; *Sigourney v. Munn*, 7 id., 324; *Bolles v. Chauncey*, 8 id., 389; *Booth v. Barnum*, 9 id., 286. 2. The complaint states no facts sufficient to warrant the subrogation asked. It shows that the plaintiff is simply a volunteer, advancing the money as a mere investment. To entitle him to subrogation, it should appear that he had paid the Hodson mortgage as surety, or to protect some interest which he had in the premises. May on Ins., 558; *Gadsden ads. Brown*, Speers' Eq., 37; *Erb's Appeal*, 2 Penn., 296; *Goswiler's Estate*, 3 id., 200; *McGinnis's Appeal*, 16 Pa. St., 445; *Lloyd v. Galbraith*, 32 id., 103; *Richmond v. Marston*, 15 Ind., 134; *Downer v. Miller*, 15 Wis., 612; *Sanford v. McLean*, 3 Paige, 117; *Marvin v. Vedder*, 5 Cow., 671; *Banta v. Garmo*, 1 Sandf. Ch., 383.

RYAN, C. J. This appeal involves two distinct questions:

I. The sufficiency of the *lis pendens* in the action brought by the respondent against Bates and others.

That was a suit in equity, seeking to have certain conveyances held for mortgages only, and certain other conveyances held to be void. Notice of the pendency of the action was filed, stating the nature of the suit, enumerating the several conveyances involved, and describing the land conveyed by each conveyance. We cannot doubt, and we do not understand it to be seriously questioned, that if the notice had there stopped, it would have been a sufficient compliance with the statute. Ch. 134, sec. 7, R. S. For it gave, in very intelligible form, the names of the parties, the object of the

Watson vs. Wilcox, impleaded.

action, and a description of the property affected by it. But the notice proceeds, by way of supererogation, to add a conclusion undertaking to describe, what had already appeared, the property to be affected by the action, and giving a wrong description. By what is obviously a clerical error, this description twice substitutes the word *north* for *south*, and so describes other land not included in the conveyances in question. And the only question on the sufficiency of the *lis pendens* is, whether this needless and false conclusion vitiates the whole notice.

We cannot think that it does. The statute charges every subsequent purchaser with constructive notice of the whole paper filed, which gives notice of the property affected by its true description. The constructive notice of the statute is equivalent to actual notice by reading the *lis pendens* filed. Any person of reasonable intelligence, reading it, would perceive the error. And the appellant, as others interested in the title, appears to be chargeable with knowledge that the true description of the property is in the statement of the conveyances, because they are in his chain of title. *Pringle v. Dunn*, 37 Wis., 449, and cases there cited. Were that otherwise, the notice is sufficient as to both descriptions, the true and the false. The false description is mere surplusage; and *utile per inutile non vitiatur*. See *Thompson v. Jones*, 4 Wis., 106; *Jarvis v. McBride*, 18 id., 316; *Dupont v. Davis*, 30 id., 170. All that the statute requires is in the notice, independently of this superfluity, which serves only to add notice of a falsehood to notice of the truth.

This case is quite distinguishable from *Spraggon v. McGreer*, 14 Wis., 439, and *Miller v. Sherry*, 2 Wall., 237, cited for the appellant. In the first of these cases, the notice of *lis pendens* contained no correct description of the premises in controversy; and in the second, the creditor's bill, which was relied on for notice, described no specific realty whatever. It is also distinguishable from *Thomson v. Wilcox*, 7 Lans., 376,

Watson vs. Wilcox, impleaded.

in which there was a single misdescription by metes and bounds coupled with the correct street number. There the one description was inconsistent with itself, the principal description being bad and the incident good. This is essentially different from two descriptions of different parcels, both certain in themselves. In the case in Lansing there was a failure of correct description of any land; in this, there is a correct and independent description of the land in controversy, and also a correct and independent description of other land not in controversy, inserted by mistake: a mere surplusage.

Of course, the merits of the case in which the *lis pendens* was filed, are not before us here. And, for the reasons stated, we hold the *lis pendens* sufficient to charge the appellant with notice.

II. The claim of the appellant to be subrogated to Sarah Ann Hodson, mortgagee of the premises in controversy under George and Harriet Harvey; that is, to have his mortgage subrogated to hers.

Before the appellant took his own mortgage from George and Harriet Harvey, he was a stranger to the title, and had no connection with the mortgage debt due to Sarah Ann Hodson. His action in the premises was voluntary. He first proposed to purchase the Hodson mortgage, but subsequently abandoned that intention and advanced the amount due upon it for the Harveys, for the express purpose of satisfying and canceling the Hodson mortgage. This was done; the appellant thereupon taking a new mortgage for his own security. It is difficult to see how the doctrine of subrogation can aid him.

The rule is thus stated by WALWORTH, C.: "It is only in cases where the person advancing money to pay the debt of a third party, stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course,

Watson vs. Wilcox, impleaded.

without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished." *Sandford v. McLean*, 3 Paige, 117.

The same rule is sanctioned by this court in *Dorner v. Miller*, 15 Wis., 612. Mr. Justice PAINE there remarks: "If Miller had simply loaned his credit to Steever to enable him to raise the money with which to pay the Lyness judgment, Miller being in no way bound to pay it, either as security or otherwise, this alone would not have entitled him to be subrogated to the rights of Lyness. We know of no case that has ever carried the doctrine of subrogation so far as to hold that a mere loan of money, for the purpose of enabling the borrower to pay a debt, entitles the lender to be subrogated to the rights of the creditor whose debt was thus paid." And *Pelton v. Knapp*, 21 Wis., 63, appears to proceed upon the same principle. See also *Marvin v. Vedder*, 5 Cow., 671; *Richmond v. Marston*, 15 Ind., 134; and the English and American notes to *Aldrich v. Cooper*, Hare & Wallace's edition of White & Tudor's Leading Cases, *passim*. And we see nothing in conflict with the rule in the cases in this court, *Morgan v. Hammett*, 23 Wis., 30; *Raymond v. Holborn*, id., 57; *Blodgett v. Hitt*, 29 id., 169, and *Winslow v. Crowell*, 35 id., 639, cited for the appellant.

Banta v. Garmo, 1 Sandf. Ch., 383, was a case like this, where money was advanced by the junior mortgagee to pay the prior mortgage, which was thereupon satisfied; although in that case the satisfaction piece was not recorded. The Vice Chancellor followed *Sandford v. McLean*; remarking of the junior mortgagee's claim of subrogation, that "if the question were open, I should at once say that the evils which would flow from the adoption of such a principle, would far overbalance the hardship of particular cases which occur under the rule of law as now settled."

Dutcher vs. Dutcher.

It is therefore impossible to uphold the appellant's claim to be subrogated to the rights of Sarah Ann Hodson, or to revive her mortgage purposely extinguished by his own voluntary act.

The demurrer to the complaint was properly sustained, and the judgment of the court below must be affirmed.

By the Court.— Judgment affirmed.

DUTCHER VS. DUTCHER.

DIVORCE: RESIDENCE OF PLAINTIFF: LIMITATION OF ACTION: PLEADING: JUDICIAL DISCRETION IN DIVORCE: COSTS. (1-3) *Length and character of residence required of plaintiff in divorce.* (4-7) *Nonresidence a personal disability. How pleaded.* (8) *Statutory limitation of the action.* (9, 10) *How limitation to be pleaded. Effect of general denial under the code.* (11, 12) *Judicial discretion in aid of the policy of divorce statutes.* (13) *Rules of pleading and practice relaxed only to protect public interest.* (14) *Costs.*

1. Sec. 12, ch. 111, R. S., rests jurisdiction of actions for divorce in this state upon the residence of *the plaintiff* alone, and requires the plaintiff to have resided here one year immediately preceding the suit, except when the suit is for adultery committed while the plaintiff is a resident here, and when the marriage is solemnized here and plaintiff continues to reside here until suit brought.
2. The legislature, in enacting this statute, was legislating for the citizens of this state, and not for others; and the residence required by it must in each case be actual and *bona fide, animo manendi*; such a residence as, continuing for a year, would make a man a qualified elector of the state.
3. The rule that the domicile of the wife follows that of the husband, is inapplicable, at least under our statute, to a case of divorce, where the parties are actually living in different jurisdictions; and the fact that the husband's domicile has been in this state for many years will not enable the wife to sue for a divorce here, if she has continued to live in another state.
4. In such an action the plaintiff's want of residence under the statute is a *personal disability*, which may be cured, and is matter in *abatement* and not in bar of the action.

Dutcher vs. Dutcher.

5. Under the code, matter of abatement and matter of bar may be set up as separate defenses in the same answer; but neither the distinction between the two kinds of defense, nor the legal effect of judgments upon them respectively, is affected by the code.
6. If matter of abatement, not apparent in the complaint, is relied on as a defense, it must be *specially pleaded* in the answer (R. S., ch. 125, secs. 5, 8), and a mere general denial is not sufficient.
7. Even if a defense in divorce on the ground of plaintiff's nonresidence were in the nature of a plea to the *jurisdiction*, it would have to be pleaded *specially*.
8. Subd. 3, sec. 13, ch. 111, R. S. (which provides that in any action brought for divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce "when there shall have been no express forgiveness and voluntary cohabitation of the parties, but the action shall not have been brought *within three years* after the discovery by the plaintiff of the offense charged"), was copied in 1849 from the revised statutes of New York of 1829 (except that *three years* are substituted for *five*); and was taken here with the settled construction previously given it by the courts of New York. And where the plaintiff knew that the defendant was living in open and continuous adultery with another person more than three years before action brought, the right to maintain such action is barred, although such adulterous intercourse is continued down to the commencement of the action; such having been the settled construction of the statute in New York, before its adoption here.
9. Where, however, the existence of such statutory bar does not appear from the complaint, it must be pleaded by the defendant in his answer, as new matter, and he cannot avail himself of it under a general denial.
10. As a rule, a general denial under the code is a mere traverse, in bar, of the facts pleaded in the complaint, and does not admit special defenses in abatement or in bar.
11. In suits for divorce (especially under the statute of this state, which gives divorce as a right only so far as the right is to be implied from the grant of jurisdiction to the courts, which is in terms permissive only), the court will exercise a judicial discretion in accordance with the policy of the statute, and will withhold judgment of divorce in cases not within the statute upon their merits.
12. Hence, it appearing conclusively in this case that the plaintiff had not such a residence here as the statute requires, and it also appearing, but not so conclusively, that she had notice of the defendant's adulterous cohabitation with another person more than three years before suit brought (although neither fact is pleaded specially as a defense in the answer, so that, in a mere question of private right between the parties, defendant

Dutcher vs. Dutcher.

could not take advantage of either), the judgment in plaintiff's favor is reversed, with directions to the court below to permit the answer to be amended, or to consider it as amended on the trial, so as to raise the defense in abatement, and to dismiss the complaint on the sole ground of plaintiff's nonresidence at the commencement of the suit.

13. *As between the parties*, the rules of pleading and practice will be enforced in divorce suits as in other cases; and they will be relaxed in such suits only when the public interest is involved.
14. The *costs* in this court and the court below are required to be paid by the defendant, who is the appellant.

APPEAL from the Circuit Court for Ozaukee County.

Action commenced in July, 1874, for a divorce on the ground of adultery, alleged to have been committed at various times between June 26 and July 6, 1874. The answer was a general denial. The plaintiff testified, in substance, that she and the defendant were married in 1862, in New York, where the parties lived for about two years, when the defendant left her and came to Wisconsin; that she knew where he was living in Wisconsin, and had his address; that before he left New York in 1864, and while the person with whom adultery was charged in the complaint was a servant in their house, the plaintiff observed improper familiarities between them, and that such person had accompanied the defendant when he left New York for the west; that plaintiff had lived with her mother in New York most of the time since 1864, and made that place her home until June, 1874, since which time she had resided in Wisconsin; that before coming to Wisconsin she had correspondence with her attorney respecting the suit for divorce, and that she came here to attend to that and for no other purpose; that she had been stopping at Milwaukee and Port Washington, and in Walworth county; that she had intended to pay her board, and had been with her relatives and in the family of her attorney, and had been treated as a guest; that her mother's house was her home, and the only home she had, and for that reason she had left her son there; that at the time of the trial she had no definite purpose as to

Dutcher vs. Dutcher.

going back to New York; she intended to go back, but might stay there, and might not; that she had previously intended to go back; that she had commenced a suit for divorce against the defendant a few months after he left New York, charging him with adultery with the same person as in this case, but that said action was not prosecuted to judgment. Considerable testimony was introduced on the part of the plaintiff, respecting the charges made in the complaint, and respecting the amount of defendant's property. The defendant introduced, with other evidence, the record of the action commenced in New York in 1865, from which it appeared that in that action the plaintiff charged the defendant with having lived in open adultery in Sheboygan county, Wisconsin, with the same person above referred to.

Judgment for plaintiff; from which defendant appealed.

J. C. Gregory, for appellant:

1. The courts of this state are not authorized to grant divorce to a plaintiff who has never been a resident of the state, or who was not a resident at the commencement of the action. And the residence required to give jurisdiction must be intended by the petitioner to be a permanent one, *bona fide*, *animo manendi*, and not a transient sojourn. *Williamson v. Parisien*, 1 Johns. Ch., 388; *Smith v. Smith*, 4 Greene (Iowa), 271; *Hinds v. Hinds*, 1 Iowa, 86, 49; *Spragins v. Houghton*, 2 Scam., 377; *Fry's Election Case*, 71 Pa. St., 302; *Thompson v. The State*, 28 Ala., 12, 21; *Reeder v. Holcomb*, 105 Mass., 93; *Brown v. Ashbough*, 40 How. Pr., 260; *Winskip v. Winskip*, 16 N. J. Eq., 107; 1 McCarty, 79. The words *domicile*, *residence*, and *inhabitaney*, mean the same thing; that is, a fixed abode in a place with an intention of always remaining there. *Crawford v. Wilson*, 4 Barb., 518; 2 Bishop on M. & D., ch. 8; *Case v. Clarke*, 5 Mason, 70; *Shelton v. Tiffln*, 6 How. (U. S.), 163; *Hall v. Hall*, 25 Wis., 600. 2. The jurisdiction of the court in divorce cases depends upon the residence of the plaintiff, whether the plaintiff be

Dutcher vs. Dutcher.

husband or wife. *Manley v. Manley*, 4 Chand., 96; *Hubbell v. Hubbell*, 3 Wis., 662; *Gleason v. Gleason*, 4 id., 64; *Shafer v. Bushnell*, 24 id., 372; R. S., ch. 111, sec. 12. The court possesses no power over the subject of divorce, except such as is conferred by statute (*Barker v. Dayton*, 28 Wis., 379), and can take jurisdiction of the subject only when the fact of plaintiff's residence is shown. *Bennett v. Bennett*, 28 Cal., 599; *Ewing v. Ewing*, 24 Ind., 468; *Goldbeck v. Goldbeck*, 3 C. E. Green (N. J.), 42. The objection to the jurisdiction can be made at any stage of the proceeding. *Dewey v. Hyde*, 1 Pin., 470; *Congar v. R. R. Co.*, 17 Wis., 485; R. S., ch. 125, sec. 9. And when the want of jurisdiction appears, the court must refuse to proceed. *Bennett v. Bennett*, 28 Cal., 599; *People v. Dawell*, 25 Mich., 247. It is plainly the policy of our statute to exclude from the courts of this state all suits for divorce in behalf of persons not *bona fide* residents of the state. Consent of parties cannot give the court jurisdiction of the subject matter of an action. 1 Wait's Pr., 185, 186; *Beach v. Sumner*, 20 Wis., 274. The question of jurisdiction does not pertain to the parties; it concerns the policy of the state and the administration of justice. 3. In actions for divorce, the residence or domicile of the wife does not follow, and is not determined by, that of the husband. *Jenness v. Jenness*, 24 Ind., 355; *Yates v. Yates*, 2 Beas., 280; *Schonwald v. Schonwald*, 2 Jones' Eq., 367; *Harteau v. Harteau*, 14 Pick., 181, 185; *Payson v. Payson*, 34 N. H., 518; *Hopkins v. Hopkins*, 35 id., 474; *Harding v. Alden*, 9 Greenl., 140; *Thompson v. The State*, *Hubbell v. Hubbell*, and *Shafer v. Bushnell*, *supra*; *Phillips v. Phillips*, 22 Wis., 256; *Craven v. Craven*, 27 id., 418. 4. The general denial was sufficient to raise the issue as to residence, this being a material allegation of the complaint. R. S., ch. 125, secs. 10, 33; 2 Wait's Pr., 419, 420; *Mattison v. Smith*, 19 Abb. Pr., 288; *Radde v. Ruckgaber*, 3 Duer, 684. The cases cited in respondent's brief to the effect that when a

Dutcher vs. Dutcher.

plaintiff sues in a representative capacity the general denial does not controvert the facts showing such capacity, are not applicable in this case, where an essential element of a cause of action under the statute is wanting. 5. The action was brought too late. R. S., ch. 111, sec. 13. Courts have always refused to grant divorces after the lapse of considerable time, without a fair explanation, on the ground that the delay raises the presumption of condonation or indifference to the offense complained of, amounting to a waiver. 2 Bishop on M. & D., §§ 48, 103, 109; *Fellows v. Fellows*, 8 N. H., 160. It cannot be claimed that the offense for which the divorce is asked was committed within three years; the proof shows it to be a continuous offense within the meaning of the statute of limitations. *Valleau v. Valleau*, 6 Paige, 207.

G. W. Foster, for respondent:

1. The derivation of the word *residence*, as well as the manner of its use in our statutes, shows that the word alone does not embrace the idea of any length of time; that it has reference to a present fact, without regard to its continuance any definite length of time. 2 Bishop on M. & D., §§ 118, 120; R. S., ch. 124, sec. 9, and sec. 10, subd. 5; *id.*, ch. 120; *id.*, ch. 34, sec. 2, subd. 4; Const., art. III, sec. 1; 12 Barb., 643; *Hall v. Hall*, 25 Wis. 600; 40 Ill., 197, 204, 205; 2 Jones (N. C.), 51. The word *abide*, which has been held as equivalent to *reside*, has the same meaning. 2 Kings, 19:27; Genesis, 29:14; Shakspeare ("Good Enobarbus, make yourself *my guest* whilst you *abide* here"); 2 Kent, 106; 11 Moak, 873, note. Does not the law intend that if adultery shall be committed while the husband and wife are in this state, the injured party shall have redress by divorce? 2. The residence of the husband, as long as he fulfills his conjugal duties, certainly is the residence of his wife. He cannot profit by living with a paramour. 2 Bishop on M. & D., §§ 126, 127, 149, 150, 155-157, 168; 2 Kent's Com., 431, note (c); 12 Barb., 643; 3 Cal., 312; 15 N. H., 159, 160; 6 Jones, 360-364; Story's Conf., 45, 46;

Dutcher vs. Dutcher.

17 Ill., 476; 30 id., 181; 20 Ala., 629; Lieber's Am. Encyc., "Domicile," Appendix. 3. The defense of nonresidence of the plaintiff must be specially pleaded. The plea is a dilatory one, and not to the action. The general issue waives all dilatory pleas. Gould's Pl. (under the code), ch. 2, secs. 34, 37, 38 and note (VII), 43; 1 Chitty's Pl., 441; Story's Eq. Pl., §§ 706-8; *De Wolf v. Rabaud*, 1 Peters, 476; *Sheppard v. Graves*, 14 How. (U. S.), 505; 3 Abb. Nat. Dig., 493, 494; Conkling's Treat., 375; 1 Kent, 345, 346. The general denial under the code is no broader than the general issue at common law. *Sanford v. McCreedy*, 28 Wis., 103, 106, 107; *Ewon v. Railway Co.*, 38 id., 613-627; *Sweet v. Tuttle*, 14 N. Y., 465; *Gardner v. Clark*, 21 id., 399; R. S., ch. 125, sec. 8, and sec. 5, subd. 2.

RYAN, C. J. We do not understand the appellant's adulterous intercourse with his paramour to be questioned on this appeal. We understand his counsel to rest the appeal on two positions: first, that the respondent is not a resident, within the statute; and second, that she had discovered the adulterous cohabitation of the appellant more than three years before suit brought.

I. We have no doubt of the true construction of sec. 12 of the statute of divorce, R. S., ch. 111, a reënactment of ch. 79 of 1849. Wisely or unwisely, it is the policy of the statute to rest jurisdiction of divorce here upon the residence of the plaintiff alone. *Manley v. Manley*, 3 Pin., 390; *Hubbell v. Hubbell*, 3 Wis., 662; *Gleason v. Gleason*, 4 id., 64; *Shafer v. Bushnell*, 24 id., 372. Sec. 12 requires a residence of the plaintiff for one year before suit brought, except in two instances: first, when the suit is for adultery committed while the plaintiff is a resident here; and second, when the marriage is solemnized here, and the plaintiff continues a resident till suit brought.

The policy of the statute in requiring a year's residence is ob-

Dutcher vs. Dutcher.

viously to secure good faith in the residence of parties coming from without the state and applying for divorce here. For all grounds of divorce except adultery, whether taking place before or after the residence of a plaintiff coming here, the statute exacts a year's patience as test of the *bona fides* of the residence claimed here. But when so grave an offense as adultery is committed after the plaintiff has acquired a residence here, although for less than a year, the statute does not require sufferance of the offense for the rest of the year. So when the marriage takes place here and the plaintiff remains a resident, though for less than a year, the statute does not require forbearance for the rest of the year. It accepts the peculiar circumstances of these two cases as test of *bona fides* in lieu of a full year's residence in other cases.

The rule is familiar that the words *reside* and *residence*, in the section, must bear the same sense in the three cases. In each the statute requires the same residence, though for longer or shorter periods. The difference is in the time, not in the kind, of residence. And in each the residence must be actual and *bona fide; animo manendi*. No mere pretense of residence, no passing visit, no temporary presence, no assumption of residence here *pro hac vice* only, nothing short of actual abode here, with intention of permanent residence, will fill the letter or the spirit of the statute. *Hall v. Hall*, 25 Wis., 600; *Williamson v. Parisien*, 1 Johns. Ch., 389; *Case v. Clarke*, 5 Mason, 70. The residence must be such as, continuing for a year, would make a man a qualified elector of the state. *Shelton v. Tiffin*, 6 How., 163. "The legislature was legislating for the citizens of this state, not for others." *Winship v. Winship*, 16 N. J. Eq., 107. See *Jarvais v. Moe*, 38 Wis., 440; *Lyon v. Lyon*, 2 Gray, 367; *Re Miller's Estate*, 3 Rawle, 312; *Fry's Case*, 71 Pa. St., 302; *Brown v. Brown*, 14 N. J. Ch., 78; *Thompson v. State*, 28 Ala., 12; *Hinds v. Hinds*, 1 Iowa, 36; *Smith v. Smith*, 4 G. Greene, 266.

Dutcher vs. Dutcher.

Accepting the respondent's own statement, we cannot but hold that she came to this state for the purpose of prosecuting this suit only, without intention of permanent residence here; and that such residence as she has acquired does not entitle her to sue for divorce here under the statute.

But it is contended by her counsel, and there are cases to support his position, that the domicile of the wife follows the domicile of the husband; that, therefore, during the appellant's ten years' abandonment of her and cohabitation with his paramour, his domicile here was hers in construction of law; and that she, abiding all those years at their former domicile in New York, was yet all the while a legal resident of this state within the statute of divorce. We must hold such a theory excluded by the statute, requiring actual residence here of the plaintiff, whether husband or wife. If it had been the intention of the statute that a wife, suing a resident husband for divorce, need not be herself a resident, we take it that the statute would in some way have indicated such intention, now literally excluded by the language used.

Doubtless for certain purposes the domicile of the husband is the domicile of the wife. That rule, however, goes upon the unity of husband and wife; and very generally, if not always, implies continuing, though temporarily interrupted, cohabitation. It excludes, or should exclude, permanent separation. Permanent separation implies separate domicils of husband and wife. If the rule were to be applied to cases of desertion, it would imply something like an absurdity. The weight of authority is against the application of the rule, as applied to cases of divorce, when the parties are actually living in different jurisdictions. *Ditson v. Ditson*, 4 R. I., 87; *Harteau v. Harteau*, 14 Pick., 181; *Payson v. Payson*, 34 N. H., 518; *Hopkins v. Hopkins*, 35 id., 474; *Harding v. Alden*, 9 Greenl., 140; *Yates v. Yates*, 13 N. J. Ch., 280; *Schonwald v. Schonwald*, 2 Jones' Eq., 367; *Jenness v. Jenness*, 24 Ind., 355. The question cannot be considered an

Dutcher vs. Dutcher.

open one in this court. *Hubbell v. Hubbell*, *supra*; *Phillips v. Phillips*, 22 Wis., 256; *Shafer v. Bushnell*, 24 id., 372; *Craven v. Craven*, 27 id., 418; and other cases in this court.

We are therefore of opinion that the respondent was in no sense a resident of this state within the meaning of the statute, at the time of the commencement of her suit.

But the question remains, whether the pleadings raise the issue of her residence. Her want of residence under the statute is clearly a personal disability, not affecting the present right of action, but only the present right to prosecute the action; a disability which might be cured: clearly matter of abatement, not of bar. "Whenever the subject matter of the defense is that the plaintiff cannot maintain any action, at any time, whether present or future, in respect of the supposed cause of action, it may and usually must be pleaded in bar: but matter which merely defeats the present proceeding, and does not show that the plaintiff is forever concluded, should in general be pleaded in abatement." 1 Chitty's Pl., 446. "All declinatory and dilatory pleas in equity are properly pleas, if not in abatement, at least in the nature of pleas in abatement; and, therefore, in general, the objections founded thereon must be taken *ante litem contestatam* by plea, and are not available by way of answer, or at the hearing." Story's Eq. Pl., § 708. So Lord REDESDALE distinguishes pleas "that the plaintiff is not entitled to sue by reason of some personal disability," and that "the plaintiff has no interest in the subject, or no right to institute a suit concerning it," from pleas in bar, and calls them pleas to the person of the plaintiff. Mitford's Pl., 220.

And the distinction is not one of form merely, but of substance. For, generally, judgment for the defendant on pleas in abatement, abates the action only; on plea in bar, bars the cause of action everywhere and forever. In the present case, judgment against the respondent for want of residence within

Dutcher vs. Dutcher.

the statute, should not operate to bar another action here, if she should have acquired a residence; or elsewhere, at any time or under any circumstances.

The code does not touch the distinction between defenses in abatement and defenses in bar, or the legal effect of judgments upon them. It does indeed modify the manner, form and time of putting in such defenses, but does not confound them or their consequences. Formerly, pleas in abatement and pleas in bar must have been separately and successively pleaded in that order; now, matter of abatement and matter of bar may be set up as separate defenses in the same answer. *Freeman v. Carpenter*, 17 Wis., 126. Whether they may be successively pleaded and tried; or, being pleaded together, may be separately tried, are questions not now before us.

If certain matters in abatement are apparent in the complaint, they are ground for demurrer under the code. But if matter in abatement, not apparent in the complaint, be relied on as a defense, it must be specially pleaded in the answer. Ch. 125, secs. 5, 8, R. S.

A general denial is a plea in bar, not broader at least than the general issue at common law, and cannot raise any defense by way of abatement. *Martin v. Pugh*, 23 Wis., 184; *Sanford v. McCreedy*, 28 id., 103; *Ewen v. Railway Co.*, 38 id., 613. Judgment for the defendant upon a general denial, is a general judgment: a bar to all future actions for the same cause. And it would be a cruel abuse that it should go upon a defense in abatement, concealed *in gremio*. The code intended no such perversion of justice. And it is well settled in this court, that matter in abatement, not apparent in the complaint, must, like other special defenses, be specially pleaded in the answer. *Freeman v. Carpenter*, *Sanford v. McCreedy*, *Ewen v. Railway Co.*, *supra*; *Moir v. Dodson*, 14 Wis., 279; *Cord v. Hirsch*, 17 id., 403; *Kimball v. Noyes*, id., 695; *Harbeck v. Southwell*, 18 id., 418; *Bevier v. Dillingham*, id., 529; *Wilson v. Jarvis*, 19 id., 597; *Robbins v.*

Dutcher vs. Dutcher.

Deverill, 20 id., 142; *Supervisors v. Hackett*, 21 id., 613; *Lefebvre v. Utter*, 22 id., 189; *Quinn v. Quinn*, 27 id., 168; *Noonan v. Orton*, 34 id., 259; *Wittman v. Watry*, 37 id., 238; *Smith v. Peckham*, ante, p. 414. This point was overlooked at the bar, and therefore not passed upon by the court, in *Hall v. Hall*, 25 Wis., 600.

There is a strong analogy between this question and questions of jurisdiction in the federal courts, resting on the citizenship of parties. In those courts, all objections founded on the citizenship of the parties must be specially pleaded in abatement, or they are waived. *Conard v. Insurance Co.*, 1 Pet., 386; *D'Wolf v. Rabaud*, id., 476; *Sheppard v. Graves*, 14 How., 505.

The appellant contends that the defense here is in the nature of a plea to the jurisdiction. We do not think so, but need not discuss the point. For by all the authorities the rule equally applies to pleas to the jurisdiction, which, if not strictly pleas in abatement, are in the nature of pleas in abatement. See Chitty, Story, Mitford, *ubi supra*.

The defense, therefore, that the respondent was not a resident of the state, though well founded in fact, was inadmissible under the pleadings in this case.

II. We might have been disposed to hold, under subd. 3 of sec. 13, that where a continuing adulterous intercourse is maintained for over three years, particular acts of adultery within three years of suit brought might be considered as discovered within the three years, and so found a suit for divorce. But the question does not appear to be an open one.

The section in our statute was copied in 1849 from the revised statutes of New York adopted in 1829; with the mere difference that in subd. 3, *three* years are substituted for *five* in New York. In 1815, in *Williamson v. Williamson*, 1 Johns. Ch., 488, KENT, C., held, in the absence of any statutory rule but in analogy to the civil law, that a delay in suing for a divorce for five years after notice of an adulterous inter-

Dutcher vs. Dutcher.

course still continuing when the bill was filed, was a bar; on the presumption of condonation. The New York subdivision was expressly intended to incorporate that rule in the statute. See reviser's notes, 5 Edmunds Stats. at Large, 401. In *Valleau v. Valleau*, 6 Paige, 207, decided in 1836, the construction of the subdivision was necessary to the decision of the case. After stating the rule of *Williamson v. Williamson*, and saying that the principle of that case was incorporated into the revised statutes, WALWORTH, C., proceeds to say:

"The revisers, in their report to the legislature, refer to this decision as containing the principles which they had introduced into the revised statutes on this subject. In conformity with that decision, therefore, I must declare the true construction of the third subdivision of the 42d section of the article of the revised statutes relative to divorces dissolving the marriage contract, to be, that if the complainant knows that his wife has contracted a second marriage and continues openly to cohabit with such second husband, or that she is living in open and continued adultery with another person even without the usual form of a marriage, the right to file a bill for a divorce for such adultery will be barred after the expiration of five years, although such cohabitation or adulterous intercourse is continued down to the time of the commencement of the suit. And where such continued adultery is open and notorious, the complainant must also satisfy the court that, by reason of his absence from the country or otherwise, he was not aware of the fact of such continued cohabitation and adultery until within five years from the time of the commencement of the suit."

We cannot find that the decision of *Valleau v. Valleau* has ever been questioned in New York, before or since we adopted the section here. It is therefore conclusive upon this court. We took the statute with its construction. *Dra-per v. Emerson*, 22 Wis., 147.

Again accepting the respondent's own statement, she ap-

Dutcher vs. Dutcher.

pears chargeable with notice of the appellant's adulterous intercourse commenced in New York nearly twelve years ago, and thence continuously maintained to the bringing of this suit. So chargeable with notice, she could not set up specific acts in the continuing adulterous intercourse as ground of divorce.

But the question remains, whether the appellant could avail himself of this defense under his general denial. We are quite clear that he could not.

The continuous relation between the appellant and his paramour does not appear in the complaint. It is therefore new matter in defense to be pleaded by the defendant. Generally, a general denial only traverses matters pleaded in the complaint.

As has been seen, sec. 13 goes upon condonation, expressed or implied; the statutory limitation of subd. 3 going upon condonation implied by lapse of time. And where the bar of the statute does not appear in the complaint, it must always be pleaded. *Orton v. Noonan*, 25 Wis., 672; *Heath v. Heath*, 31 id., 223; *Barden v. Supervisors*, 33 id., 445; *Tarbox v. Supervisors*, 34 id., 558. And so express condonation cannot be shown under a mere denial, but must be expressly set up as a defense. *Wood v. Wood*, 2 Paige, 108; *Smith v. Smith*, 4 id., 482.

The defense, therefore, that the respondent had discovered the appellant's adultery more than three years before she brought this suit, and is therefore barred, though apparently well founded in fact, was inadmissible under the pleadings in this case.

It is perhaps not inappropriate to remark here that, as a rule, a general denial under the code is a mere traverse, in bar, of the facts pleaded in the complaint; and that the uses often claimed for it, as admitting special defenses in abatement or in bar, are contrary to the letter and spirit of the code; hiding, rather than disclosing, the grounds and facts relied on in defense.

Dutcher vs. Dutcher.

III. These views would, in ordinary cases, dispose of this appeal by affirmance of the judgment of the court below. But in cases of this nature, we cannot consider our duty ended by determining the strict rights of the parties, between themselves, under their pleadings and proofs, when these support a divorce apparently unwarranted by the statute. Questions of public policy are involved in divorce, which, after grave consideration, we think that we are not at liberty to disregard.

In *Campbell v. Campbell*, 37 Wis., 206, it is said that the jurisdiction of divorce is a peculiar jurisdiction, because the marriage relation is a peculiar relation. It might have been added, with equal truth, and for the same reason, that the statute of divorce is a peculiar statute.

We regret that we have not access to the statute under which *Williamson v. Williamson* was decided by KENT, C. That great master of equity held that statute to be permissive, subject to a sound judicial discretion. He says:

"I cannot think the statute intended that the party injured should be entitled to come, *at any time*, and *in every case*, and to put the cause on the single dry question, Has an act of adultery, in judgment of law, been committed? Nothing could operate more unjustly than such a construction. The statute says, that, after the truth of the adultery charged shall have been ascertained, 'it shall be lawful for the court' to decree a dissolution of the marriage. This language may and ought to be understood as leaving to the court the exercise of that sound discretion which the nature of the case, and the principles of equity, might require. The general rule of the *English* jurisprudence, on this subject, must be considered as applicable, under the regulations of the statute, to this newly-created branch of equity jurisdiction. It is not to be supposed that the statute intended, in all cases of adultery charged and proved, that the court should be absolutely bound (no matter under what circumstances) to grant to the prose-

Dutcher vs. Dutcher.

cutor the effect of a suit carried on for his own benefit. It is to be recollected that a bill for a divorce is not a public but a private prosecution, brought at the instance of the party aggrieved, and subject to his control." And again: "I think enough has been said to show that a decree for a divorce is not to be taken as *of course*, though the fact of adultery may have existed; and I cannot but persuade myself that when the statute created a jurisdiction in this court, for the cautious and limited exercise of the power of divorce, it intended that those settled principles of law and equity on this subject, which may be considered as a branch of the common law, should be here adopted and applied."

It has been seen that this case was in the minds of the revisers in New York, and influenced them in framing the statute of divorce from which sec. 13 in our statute is copied, and on which our whole statute is largely modeled. And, accordingly, we find the New York statute in terms permissive both as to judgments of nullity and judgments of divorce. In our statute, the provisions for judgments of nullity or affirmance of marriage are in terms obligatory, and for judgments of divorce in terms permissive throughout; a distinction of language, in kindred sections, in the same statute, pregnant with meaning.

The rule that *may* means *shall* in statutes where the public or individuals have a claim *de jure* to the exercise of the power conferred, is not overlooked. *Cutler v. Howard*, 9 Wis., 309. But we have the great authority of Chancellor KENT for holding permissive words in the grant of this peculiar jurisdiction, to imply a sound judicial discretion in its exercise; strongly fortified here by the abrupt transition of the statute from uniformly obligatory words in one branch of the jurisdiction conferred, to uniformly permissive words in the other; an antithesis precluding oversight and implying design. This view is the stronger, that there was no right of divorce before the statute; that the statute gives divorce, as a

Dutcher vs. Dutcher.

right, only so far as the right is to be implied from the grant of jurisdiction to the courts, in terms permissive only; the public interest being concerned that the exercise of the jurisdiction should be subject to a sound judicial discretion. See *Winship v. Winship*, *Williamson v. Williamson*, *supra*; *Barrere v. Barrere*, 4 Johns. Ch., 187; *Van Veghten v. Van Veghten*, *id.*, 501; *Smith v. Smith*, 13 Gray, 209; *Smith v. Smith*, 4 Paige, 432; *People v. Darwell*, 25 Mich., 247; *Bennett v. Bennett*, 28 Cal., 599.

We do not mean to put the policy of the courts above the policy of the legislature; or to hold that the courts should exercise any discretion to refuse divorces authorized by the statute. But we do hold that, whatever apparent claim there may be to divorce, resting on mistake or collusion of the parties or other accident, the courts of this state are vested by the statute with judicial discretion to withhold judgment of divorce, in cases not within the statute upon their merits. We understand just such a discretion to have been claimed by the chancellor in New York in *Smith v. Smith*, *supra*, under the statute on which ours is modeled, and before it was adopted here.

So, too, SHAW, C. J., speaking of an action for divorce, says: "If this were a mere private action or suit, in which the personal rights of the parties alone were concerned, there would be a strong reason for applying the doctrine of estoppel to the act of the husband in resisting the present motion of the wife. But a suit for divorce is of a very different character; it is one in which the public have an interest, and in the conduct and result of which the best interests of society are concerned." And the court therefore refused to apply the doctrine of estoppel, as in ordinary cases. *Smith v. Smith*, 13 Gray, 209.

It concerns the public welfare that the state should not be made a free mart of divorce for strangers; and that, amongst her own people, divorce should not become matter of free will as much as marriage; a personal right independent of public

Dutcher vs. Dutcher.

right and inconsistent with public welfare. Divorces without the letter and spirit of the statute in fact, but made to look within it by design or mistake, or accident, are frauds upon the statute and offenses against public policy. And it is the duty of the courts, *ex officio*, as WALWORTH, C., has it, to look closely into actions for divorce, and to direct inquiries into the facts, when necessary, and finally to deny all divorces which would be abuses of the statute.

This case evidently proceeded in good faith upon a misconstruction of the statute; but the judgment, if affirmed, would be none less in legal sense a fraud upon the statute.

We regret that it is our duty to reverse it; but we are not sorry that the occasion of enforcing this rule places it above all possibility of bias, because all sympathy must be with the respondent.

It appears quite conclusively that the respondent had not such residence here as would support her right to bring the suit in the court below. It appears also that she had notice of the adulterous cohabitation of the appellant more than three years ago; but this does not appear so conclusively, and she may be able to make a better case in another suit. We therefore think it right that the judgment against her should be in abatement, and not in bar. The judgment will therefore be reversed, with directions to the court below to permit the answer to be amended, or to consider it as amended on the trial, so as to raise the defense in abatement; and to dismiss the complaint upon the sole ground of the respondent's non-residence at the commencement of the suit; the costs in this court and the court below to be of course paid by the appellant.

We trust that this judgment will not be received as license for loose pleading or practice in actions for divorce. It is only when the public interest is involved, that the rules governing other cases will be relaxed in cases of divorce. As between the parties, the rules of pleading and practice will be

Kelly vs. Berry and others.

enforced as in other cases. *Barker v. Dayton*, 28 Wis., 367.

By the Court.—Judgment reversed, and cause remanded for judgment in the court below in accordance with this opinion.

KELLY vs. BERRY and others.

SALE OF LOGS. (1) *Waiver by vendee of objection to delivery on account of liens on the property.* (2) *Contract of sale construed; appraisal of logs by third person; no inspection required.*

REVERSAL OF JUDGMENT. (3) *No reversal for casual remark of judge, not injurious to appellant.*

1. Where, at the time of the vendor's offering to deliver property to the vendee according to contract, there are adverse liens upon the property, but the vendor furnishes security against them to the vendee's satisfaction, and the latter refuses to accept the property on the sole ground that it is of defective quality, this is a *waiver* of the objection founded on the existence of the liens.
2. A contract for the sale of logs fixed \$10.50 per M. as the price of such of them as should average 250 feet each, and provided that a limited quantity of smaller logs might be delivered on the contract, the same to be appraised by a certain person, "the value to be based on the value of the \$10.50 logs." *Held*, that this did not require an *inspection* of the smaller logs by the person named, to determine their value with reference to their *quality*; but he was to determine the value of the *merchantable* logs of the smaller sizes, on the basis that merchantable logs averaging 250 feet were worth \$10.50 (the contract implying that *all* the logs were to be merchantable); and he might ascertain such sizes *from the scale bills*.
3. A judgment will not be reversed for a casual remark of the judge to the jury, which, even if inaccurate, had little importance in the case, and could not have misled the jury.

APPEAL from the Circuit Court for *St. Croix* County.

The complaint alleges that on the 6th of November, 1872, plaintiff entered into a contract with the defendants to cut and deliver, rafted in strings, all the saw logs he should cut

Kelly vs. Berry and others.

during the ensuing winter, at prices fixed by said contract, and to have said logs rafted by the first day of June, ensuing; that he duly performed all the agreements to be by him performed, by the terms of said contract, and had rafted, and ready for delivery on said day, all said logs so cut; that the defendants, being duly notified that such logs were so ready, refused to receive them or pay for them according to said contract, whereby the plaintiff sustained damage to the amount of \$733.41.

The answer denied that the plaintiff had performed his agreement, and alleged that he had been paid all that he was entitled to receive under such contract; and further alleged that an agreement was entered into subsequent to that mentioned in the complaint, whereby it was agreed by the plaintiff, defendants and certain other parties, on account of certain liens having been filed on said logs, and certain of said logs being of inferior quality, and not in accordance with the terms of said contract, that, in order to give the defendants a good title to the logs, the plaintiff was to transfer and sell them to Coon & Barlow and L. North, and that the amount agreed by said subsequent agreement to be paid therefor should be paid to said Coon & Barlow and L. North; and that the amount so agreed to be paid was paid to said Coon & Barlow and L. North, with the assent of the plaintiff.

Upon the trial plaintiff claimed, and introduced testimony tending to prove, that the defendants, being notified of his readiness to deliver all said logs according to the contract, declined to receive them upon the ground that there were liens upon them; that thereupon he procured and delivered to the defendants an undertaking signed by Coon & Barlow, A. H. Baldwin & Co., the National Savings Bank and L. North, to receive said logs from plaintiff and deliver them to defendants upon the payment of the money to the National Savings Bank; that, upon the receipt of said undertaking by the defendants, they waived all objection to the title of the logs, but refused

Kelly vs. Berry and others.

to receive them upon the ground that they were not such logs as the contract called for.

The contract provided that the price of such logs as should "average four to the M. feet" should be \$10.50 per M. feet, and that a limited quantity of smaller logs might be delivered under the contract, "to be appraised by the surveyor general of Stillwater district, the value to be based on the value of the \$10.50 logs."

The testimony, although conflicting, tends to show that the logs in question were merchantable. The rulings of the court on the trial are sufficiently stated in the opinion.

The plaintiff recovered; and the defendants appealed.

E. E. Bryant, for appellant:

1. The defendants were perfectly justified in refusing to take the logs, so long as the liens existed. It is of the essence of the contract in such cases, that the vendor have a perfect and unincumbered title to the goods sold. *Dresser v. Ainsworth*, 9 Barb., 619; 2 Broom & Had. Com., 146, note 515; 11 Johns., 528. On failure of title, the vendee may rescind the sale, and recover the purchase money paid. 1 Bouvier's Inst., secs. 950, 953. 2. It was error to charge the jury that defendants "could have safely taken a delivery of the logs." This was not a question to be passed upon by the court; the only question being whether they were *legally bound* to take a delivery under such circumstances. And the lien law referred to by the court has nothing to do with this question. 3. It was error to admit the testimony of the surveyor general as to fixing the value of the small logs under the contract. An inspection of the logs by him was necessary, unless waived by the parties.

H. A. Wilson, for respondent, argued, *inter alia*, that when property is incumbered by a lien, and the vendee expressly waives that objection, and absolutely refuses to receive the property upon another ground, thereby inducing the vendor to omit making the title clear, the vendee cannot be heard to object to the title.

Kelly vs. Berry and others.

LYON, J. On the question whether the logs were transferred by the plaintiff to the defendants through Coon & Barlow's satisfaction of the contract, as alleged in the answer, there is a conflict of testimony. The question was fairly submitted to the jury, and they answered it adversely to the defendants. We cannot say that it was wrongly determined.

The learned circuit judge instructed the jury that if, when the undertaking of Coon, Barlow, North, Baldwin and the bank, was delivered to the defendants, they made no further objection to receiving the logs on account of the liens thereon, "but were satisfied on that point and willing to receive them under such circumstances, but then refused to receive them because they were not such logs as the contract called for," then, if the logs were in fact such as the contract called for, the plaintiff could recover, otherwise not. We think this instruction correctly states the law of waiver as applicable to the case. Manifestly, if the plaintiff, when he offered to deliver the logs, secured the defendants to their satisfaction against liens, and removed their objections to accepting the logs because of such liens, and the defendants refused to accept them on the sole ground that the logs were defective in quality, they ought not to be permitted to excuse or justify such refusal by asserting the existence of the liens.

In the course of his charge to the jury, the judge said: "I think the defendants could have safely taken a delivery of the logs, the mark being recorded in their name, but would not be compelled to pay any portion remaining unpaid on the contract until the liens against logs had been discharged, and by taking a delivery of them from *Kelly* they could be made liable to the parties having liens to the amount of the value of the logs only." This is claimed to be error. But whether it implies an unsound legal proposition, or not, it seems to be a mere casual remark, and of little importance in the case. The judge did not say that the defendants were legally bound to accept the logs notwithstanding the liens, but only that he

Kelly vs. Berry and others.

thought they might have accepted them with safety; and we think the fair construction of the charge is, that the defendants were not bound to accept the logs subject to the liens, unless they waived the right to make that objection. We do not perceive how the jury could have understood the charge differently. Hence, the remark above quoted cannot, in any view of the case, work a reversal of the judgment.

It appeared that a small portion of the logs in question scaled less than four to the M. feet; that is to say, they averaged less than 250 feet each. The evidence tends to show that the price of these logs was fixed by the surveyor general specified in the contract at \$8 per M. feet; and that he appraised them from the scale bills, without an actual inspection of the logs. He testified that he was able to determine the sizes of the logs from the scale bills in his office, and to fix the comparative value of the small logs, if not required to consider the quality thereof. The scale bills were verified by other testimony. The judge refused to give an instruction prayed on behalf of the defendants, to the effect that, unless waived by the defendants, the contract required that the surveyor general should make an actual inspection of the logs before appraising them.

The contract implies that all of the logs to be delivered under it were to be of merchantable quality, and the parties evidently contemplated that the comparative value of the small logs should be determined on that hypothesis. If so, no inspection was necessary. It seems to us that the simple problem submitted to the surveyor general, by the contract, was this: On the basis of \$10.50 per M. feet for merchantable logs which will average 250 feet each, what is the value of those merchantable logs which the scale bills show average less than 250 feet each? The scale bills showed the size of the logs to be appraised, and the contract furnished a complete basis for making the appraisal, without an actual inspection. For these reasons, and because the contract contains no ex-

Matthews and wife vs. The Town of Baraboo.

press provision requiring the surveyor general to inspect the logs, we conclude that the judge properly refused the proposed instruction.

We discover nothing further in the charge, or in the refusal of the judge to give instructions asked on behalf of the defendants, which requires special notice.

On the trial many exceptions were taken on behalf of the defendants to the rulings of the court on objections to the admission of testimony. Many of these are disposed of by the views above expressed, and many others are quite unimportant. It is unnecessary to discuss or even state these rulings. It is sufficient to say that we fail to find in any of them cause for reversing the judgment.

By the Court.—Judgment affirmed.

MATTHEWS and wife vs. THE TOWN OF BARABOO.

VARIANCE. AMENDMENT. (1) *Amendment at trial. When variance waived and when disregarded after verdict.*

HIGHWAYS. (2) *Extent of liability of towns for defective highways.*

1. The complaint for injuries caused by a defective highway charged the accident to a rock or stone, and the evidence, taken without objection, tended to show that the accident resulted from a stone, or rut, or both.
Held,

- (1) That if the question of variance had been raised on the trial, by objection to evidence of the rut, plaintiffs should have been permitted to amend according to the fact, before verdict.

- (2) That the question of variance, not having been raised on the trial, was waived by the defendant, and could not be raised after verdict. So *held* where the defendant attempted to raise that question by exceptions to the charge, taken (under the statute) during the term, but after the jury was discharged.

- (3) That if the complaint had not been amended after verdict, the judgment could not have been reversed for the variance, and such amendment

 Matthews and wife vs. The Town of Baraboo.

therefore worked no injury to the defendant; and an affidavit of surprise made by defendant after verdict, pending a motion for a new trial, and before the allowance of such amendment, was too late for any purpose except as an appeal to the discretion of the court below on the motion for a new trial.

2. A town is liable for defects anywhere in the worked and traveled part of a highway, although the same may be wide enough for three or four teams abreast.

APPEAL from the Circuit Court for Sauk County.

Action for damages for injury to the plaintiff's person, caused by a defective highway. The complaint, as amended, alleges that the defendant had "allowed, carelessly, negligently and unlawfully, a large rock or stone *and a rut* to be and remain in one of the most public highways in defendant's town, * * * * * and that one of the forward wheels of said wagon in which said plaintiff was riding so as aforesaid, suddenly struck said rock, or stone, *or dropped into said rut,*" whereby the plaintiff was injured, etc.; but the words in *italics* were first inserted by amendment after verdict for the plaintiff. Among other instructions the court gave the following: "There seems to be no doubt that the plaintiff, at the time alleged and upon the highway in question, and [at the] place in question, fell out of the wagon in which she was riding with her brother and sister, and was considerably injured. Whether or not she was thrown out by reason of the defect, a stone, a rut, or both in the highway, amounting to a defect which should render the town liable, is a question of fact for you to determine."

After verdict for the plaintiff, and while a motion for a new trial was pending, an affidavit of one of the supervisors of the defendant town was submitted, stating, in substance, that the defendant had no notice or knowledge of any defect in the highway except the stone complained of, and that the proof as to the rut was a surprise. The attention of the court was then for the first time called to the fact that the only defect

Matthews and wife vs. The Town of Baraboo.

of the highway alleged in the complaint was a stone. The complaint was then amended as above stated.

From an order denying a new trial, the defendant appealed.

C. C. Remington, for appellant, argued that as the stone in the highway was the only defect complained of, the question of any other defect ought not to have been submitted to the jury. *Ferguson v. Porter*, 4 Fla., 102; *Sayre v. Townsend*, 15 Wend., 647; *Wardell v. Hughes*, 3 id., 418. The amendment, if allowed at all, should have been upon terms of the respondents relinquishing the verdict, paying the costs, and taking a new trial. This case, in view of the affidavit of surprise, is a much stronger one for imposing such terms than *Pierce v. Northey*, 14 Wis., 9.

J. W. Lusk, for respondents:

The amendment was properly granted, it being evident that the defendant could not have been misled. *Danley v. Williams*, 16 Wis., 585; *Muzzy v. Ledlie*, 23 id., 447; *Bowman v. Van Kuren*, 29 id., 214; 34 id., 380; 30 id., 378; *Brayton v. Jones*, 5 id., 117, and Dixon's notes, p. 629. 2. The motion to amend the complaint was addressed to the discretion of the court, and is not reversible on appeal. *Van Duzer v. Howe*, 21 N. Y., 539; *Gillett v. Robbins*, 12 Wis., 330.

RYAN, C. J. The complaint, before amendment after verdict, charged the defect of the highway, and the resulting accident, to a rock or stone. Witnesses attributed the accident to a stone and to a rut; some to the one, some to the other, and some to both. All this testimony was taken without objection; no exception whatever to evidence appearing in the bill of exceptions. This not unnaturally led the learned judge of the court below to think the complaint broad enough to cover both stone and rut; and so he charged the jury. The variance between the pleading and the proof appears not to have been pointed out to him, until after verdict; the exceptions to the charge being taken, under the statute, during the term, but after the jury had been discharged.

Matthews and wife vs. The Town of Baraboo.

Had the question of variance been raised on the trial, by objection to evidence of the rut, it would have been the duty of the court below to have permitted the respondents to make the amendment before verdict, which was actually made after verdict. *Fobes v. School Dist.*, 10 Wis., 117; and numerous other cases cited by DIXON, C. J., in note to *Brayton v. Jones*, 5 Wis., 627.

The question of variance, not having been raised on the trial, was waived by the appellant, and cannot be raised after verdict. *Gee v. Swain*, 12 Wis., 450; *Gardinier v. Kellogg*, 14 id., 605; *Mead v. Bagnall*, 15 id., 162; and numerous other cases cited in the note to *Brayton v. Jones*; *Flanders v. Cottrill*, 36 Wis., 564. And this disposes of the exceptions to the charge of the court below founded upon the variance.

It is apparent that, had the complaint not been amended after verdict, the judgment could not have been reversed for the variance. The amendment therefore worked no injury to the appellant. It was purely formal. And whatever might have been the affect of the affidavit of surprise, if made upon amendment during trial, it was too late after verdict for any purpose, except as an appeal to the discretion of the court below, on the motion for a new trial.

It appears that, at the *locus in quo*, the worked and traveled part of the road was wide enough for three or four teams abreast; and the jury was instructed, in substance, that the town was liable only for defects in the worked and traveled part, but was liable for defects anywhere in that. This was undoubtedly correct. *Kelley v. Fond du Lac*, 31 Wis., 179; *Cremer v. Portland*, 36 id., 99. But the appellant claims that there was evidence tending to show two ruts or gullies; one in the traveled roadway, and another on the side of the road which might be considered outside of the traveled part; and that the wagon in which the female respondent was riding, meeting another team, turned to the left contrary to the law of the road, thus encountering the gully on the roadside,

Matthews and wife vs. The Town of Baraboo.

and so causing the accident. We are able to discover no evidence showing that the wagon went out of the traveled part of the road. And if both ruts or gullies were in that part, it is immaterial in law which caused the injury. But it is sufficient to say that the appellant asked for no instruction on that point; and that, under the charge of the court, the jury must have found that at the time of the accident, the wagon was in the traveled part of the road, and the driver was guilty of no contributory negligence.

The merits of that question were presumably passed upon by the court below in refusing a new trial. And the order, in such a case, will not be reviewed in this court. *Van Doran v. Armstrong*, 28 Wis., 236.

By the Court. — The judgment of the court below is affirmed.

INDEX.

ABATEMENT OF ACTION.

See ADMINISTRATORS, etc., 2. DIVORCE, 12-14.

ACCOUNT STATED.

See EVIDENCE, 2.

ACTION.

(A.) *Cause of Action.*

See BANKRUPTCY. COMMON CARRIER, 1, 4, 5. CONTRACTS, 5-8, 11, 12. CONVERSION, 3-5. COUNTERCLAIM, 2, 3. EXEMPTION, 3. INJUNCTION, 3. NEGLIGENCE, 1, 2. PLEADING, 2. RAILROADS, 1-3. SPECIFIC PERFORMANCE. TOWN TREASURER, 2-7. VENDOR AND PURCHASER.

(B.) *Who may bring Action.*

See ADMINISTRATORS, etc. EXEMPTION.

(C.) *Various Actions.*

In Supreme Court, pp. 79, 271.

Against the State, on Contract, pp. 79, 271.

Against City.

Damages for change of grade, p. 360.

Damages to land from city improvements, p. 409.

Against County.

To recover amount paid for tax certificates, p. 444.

Against County Board of Supervisors.

To compel (by mandamus) admission of plaintiff as member of board, p. 596.

Against Town. Injuries from Defective Highway, p. 674.

Against Estate of Decedent.

1. Appeal from order of distribution. Claim under bequest to wife, p. 96.

2. On alleged promissory note of the intestate, p. 370.

3. Claim of wages by infant, p. 376.

4. By foreign executors, p. 414.

Against Town Treasurer, etc., on Bond, pp. 328, 468, 529.

Against Receptor for Goods seized in Execution, p. 339.

Against Sheriff, for Goods seized in Execution, p. 570.

Against Railroad Company.

1. For wages of laborer in construction of road, under contractor, p. 426.
2. For value of goods destroyed by fire in depot, p. 449.
3. For personal injuries to passenger, p. 636.

Against Insurer.

1. Marine insurance, p. 88.
2. Insurance on cattle, p. 104.
3. Fire insurance, pp. 111, 121, 489.
4. Life insurance, p. 397.

*Against Husband for Necessaries furnished Wife, p. 432.**Against one adjudged a Bankrupt, p. 124.**For Value of Labor and Materials, pp. 62, 507, 585.**For Price of Machinery made to order, p. 247.**For Balance of Account, pp. 173, 314.**For Commission as Real Estate Broker, p. 419.**For Personal Services of Plaintiff and Wife, p. 553.**For Breach of Contract to receive Supplies, p. 562.**For Failure to deliver according to Contract, pp. 533, 578.**For Refusal to accept Delivery, p. 669.**On Promissory Note, pp. 63, 124, 133, 290, 300.**On Bill of Exchange, p. 520.**On Foreign Judgment, p. 614.**On Land Contract, p. 334.**On Claim for Tolls, p. 525.**To recover Possession of Real Property, pp. 182, 188, 345, 462, 538, 600.**To recover Possession of Personal Property, pp. 260, 456, 476, 570.**To recover Damages for a Conversion of Personal Property, pp. 35, 499, 515.**For Personal Injuries, pp. 75, 558.**For Injuries to Property, from Negligence, pp. 129, 552.**For Flowage of Land, p. 384.**For Libel, p. 481.**For Divorce, pp. 165, 166, 167, 308, 651.**To Foreclose Land Contract, p. 141.**Against Vendor in Land Contract, after Foreclosure of Purchaser's Equity, by Assignee of Purchase-Money Note. Trust, p. 492.**To Foreclose Mortgage, pp. 146, 219, 296, 512.**For Specific Performance, p. 364.**For Dissolution of Partnership, p. 252.**To Restrain City from destroying Plaintiff's Fruit and Ornamental Trees, etc., p. 160.**To Restrain Defendants from Digging and Mining on Plaintiff's Land, p. 317.**To Restrain Collection of Judgment, p. 590.**To Avoid Effect of Judgment, or for a Subrogation, p. 643.**Equitable Counterclaim in Action on Foreign Judgment, p. 614.*

ADMINISTRATORS AND EXECUTORS.

1. Under the statute authorizing a foreign executor or administrator of the estate of a person not a resident of this state at the time of his death, to prosecute actions here in behalf of such estate, "upon filing an authenticated copy of his appointment in the probate court of any county of this state" (Tay. Stats., 1720, § 25), the disability of such executor, etc., to sue before such filing is *mere disability*, and not want of title. *Smith et al., Ex'rs, v. Peckham, Ex'trix*, 414
2. Before the letters testamentary, etc., are filed here, such disability can be taken advantage of, by answer, only by way of *abatement*. *Ibid.*
3. A mere disability to sue, not going to the right of action, may be cured *pendente lite*; and *quere* whether (under R. S., ch. 125, sec. 40) a judgment on the merits would be reversible for such disability, even where the objection had been seasonably taken, and overruled. *Ibid.*
4. An objection in probate court to a claim against an estate on the ground that it was "outlawed and illegal and void for usury," *held*, not to raise the question of the disability of the claimants. *Ibid.*
5. On appeal from an order allowing such claim, it appeared from the formal complaint of the claimants in the circuit court, that their foreign letters testamentary of the estate in whose behalf the claim was made, were first filed *after* the appeal. *Held*, on demurrer, that the complaint was not bad for that reason. *Ibid.*
6. The proper jurisdiction for the probate of a will is that of the testator's domicile at death; and the complaint herein not showing the residence of plaintiff's testatrix at her death, an order overruling a demurrer thereto is reversed with directions to allow an amendment of the complaint. *Ibid.*

ADVERSE POSSESSION.

See DEED, 1. LIMITATION OF ACTIONS, 2, 4.

1. Secs. 6 and 7, ch. 138, R. S., relating to adverse possession under paper title, must be considered together as one entire provision; the former giving the general rule, and the latter defining certain particular conditions of such adverse possession. *Pepper et al. v. O'Dowd*, 538
2. Under these sections, actual adverse possession of part of a single lot or of a known farm does not operate as constructive adverse possession beyond the limits of such lot or farm, even where it is part of a more extensive tract included in the instrument or judgment under which the occupant entered. *Ibid.*
3. Subds. 3 and 4 of sec. 7 are independent of each other, and under the former, actual possession of part of an uninclosed lot by its use for fuel or fencing for the ordinary use of the occupant, will probably, under proper circumstances, operate as constructive adverse possession of the whole lot; but, under the limitation of sec. 6, it can in no case so operate beyond the limits of the same lot. *Ibid.*
4. Being independent, both subdivisions cannot support the same possession of the same premises; and an ambiguous possession claimed in part under each, and not supported by either alone, is not within the statute. *Ibid.*

5. In subd. 4, the word "included" must be construed in the sense of "inclosed." *Ibid.*
16. As applied to a single lot, subd. 4 may operate to limit the effect of subds. 1 and 2, by requiring the improvement or inclosure to be "according to the usual course and custom of the adjoining country;" subd. 4 making actual possession by improvement or inclosure of a part, constructive possession of the whole, only where the unimproved or uninclosed part is left so according to such course and custom.] *Ibid.*
7. The "single lot" of the statute is the smallest legal subdivision of land; and its extent is certain of itself, without recourse to any course or custom. *Ibid.*
8. The "farm" of the statute is land held for cultivation and cultivated in whole or in part, of whatever size, shape or boundaries, and whether comprising several lots or parts of lots, or less than one lot. *Ibid.*
9. It being the purpose of the section to confine constructive adverse possession to such visible and notorious possession as may fairly imply notice and acquiescence, the extent of the "farm" of subd. 4 must be "*known*" in the sense of being *notorious*. *Ibid.*
10. To constitute adverse possession, entry must be made with defined claim of title and of possession; and after entry, such claim cannot be enlarged, except by acts equivalent to a new entry and new claim of adverse possession. *Ibid.*
11. Entry upon part of a lot under claim of title to the whole, while the other part is held adversely, cannot found adverse possession of the whole lot, though afterward the adverse possession of the other part be abandoned. *Ibid.*
12. To establish adverse possession of a known farm, outside of the actual possession taken, the known extent of the farm *at the time of entry* must be established, and adverse possession founded on such entry is limited to that extent. *Ibid.*
13. Constructive adverse possession of uninclosed land under subd. 4 can be established only by actual proof of a course or custom in the adjoining country, sanctioning the manner of occupation. *Ibid.*
14. To make the actual adverse possession of part of a tract of farming land once possessed and used as several farms, by several owners, constructive adverse possession of the whole tract as one farm, it must be shown, not merely that the whole tract is included in some of the claimant's title papers, but that the several farms had been joined together in one known farm *before* the entry under which he claims, and constituted one known farm at the time of such entry. *Ibid.*
15. The actual use of one lot for fuel or fencing under subd. 3, sec. 7, cannot carry with it constructive use of the same piece of timber on another lot. To come within that subdivision, it seems that the land must be held in good faith for the supply of fuel or fencing for the purposes there named, *as its sole or principal object*; the *extent* of the land so used must bear a reasonable proportion to the use; and such use must be distinct, visible, continued and notorious, under claim of title, and not mere casual trespass or occasional use; and what is a *reasonable quantity* in each case is a question *for the jury*, under proper limitation and instruction. *Ibid.*

AFFIDAVIT.

See LIEN (B.), II, 5, 6.

AGENCY.

See CONTRACTS, 9-12. EVIDENCE, 10, 11. PLEADING, 4.

1. One who acts as the vendor's agent in the sale of property, without the knowledge of the vendee, cannot recover from the vendee for services in effecting such sale as his agent; his concealment of the fact that he was agent for the vendor being a fraud in the law. *Meyer et al. v. Hanchett*, 419
2. Whether one who acts as middleman in effecting an exchange of real property, with full knowledge of both parties, can recover from both for his services, is not here decided. *Ibid.*

ALIMONY.

See CHANGE OF VENUE, 2. DIVORCE, 6-8.

ALLOTMENT of Land by Congress.

See EVIDENCE, 4, 5.

AMENDMENT OF PLEADING.

See ADMINISTRATORS, etc., 6. COSTS, 3. DIVORCE, 20. EJECTMENT, 2. VARIANCE.

1. In an action to enforce an alleged lien on defendant's house for work done and materials furnished under contract, there was no error in refusing plaintiff leave, at the trial, to *substitute a new cause of action*, by amending the complaint so as to allege damages accruing to him from defendant's refusal to permit him to perform the contract. *Johnson v. Filkington*, 62
2. A suit in equity may be changed into an action at law by consent. Whether such a change can be otherwise made, is a question not raised by the record in this case. *Lowe v. Hyde*, 345
3. Where it was impossible to decide the cause on the merits while the record presented it as a suit in equity, and both parties had fully argued the merits, and were desirous of a decision thereon, this court reserved its judgment upon the merits long enough to give them an opportunity to amend the record, by stipulation or otherwise, so that the action might stand as one in ejectment. *Ibid.*

ANSWER.

See ADMINISTRATORS, etc., 2. DIVORCE, 12-15, 17, 18, 21. EJECTMENT, 3. VARIANCE, 1.

APPEAL.

(A.) *From Board of County Supervisors.*

See LIMITATION OF ACTIONS, 3.

(B.) *From Probate Court.*

See ADMINISTRATORS, etc., 4, 5.

(C.) *To Supreme Court.*

See CHANGE OF VENUE, 3, 4. COSTS. CRIMINAL LAW, 1, 2. DIVORCE, 7. EXCEPTIONS. JUDGMENT (E.), II.

1. Where the bill of exceptions is not certified to contain all the evidence, the judge's finding of facts will be presumed correct, though not sustained by the proof preserved in the bill. *Sherman v. Mad. Md. Ins. Co.*, 104
2. Where the findings of fact filed by the judge include a proposition which is really a conclusion of law, it must be treated as such, on appeal. *Ibid.*
3. The rules requiring the brief on each side to contain a succinct statement of so much of the record as is essential to an understanding of the questions discussed, and the printed case to present an abstract of the material matters, will be enforced by a peremptory dismissal of the appeal or writ of error where there is a marked failure to comply with them. *Heath v. Silvertorn L. M. & S. Co.*, 146
4. On appeal from a judgment of divorce, where there was no appearance in the trial court by the defendant before judgment, and no bill of exceptions, this court cannot review the evidence (taken before a referee); and, if the complaint states a good ground for divorce, must presume that the evidence was sufficient to sustain it. *Hopkins v. Hopkins*, 165
5. A party ought not to be permitted to bring two appeals to obtain that which he can obtain, if at all, upon one. *Hopkins v. Hopkins*, 166
6. Defendant's appeal from an order refusing to set aside or modify a judgment of divorce, is dismissed, for the reason that he has also appealed from an order denying a subsequent motion to set aside or modify the same judgment, covering the ground of the first motion as well as additional ground. *Ibid.*
7. The printed cases on this appeal having been actually served December 30, 1875, and retained, a motion made on the 1st of February following, to dismiss the appeal because such cases were not served fifteen days before the commencement of the term, was too late. *Hundhausen v. Atkins*, 36 Wis., 250. *Flanders v. McDonald*, 238
8. Where the same motion, on the same ground, is made and denied twice in the same action, and both orders appealed from, the relief sought being obtained on the first appeal, the second is dismissed. *Moe v. Moe*, 308
9. This court has no power to amend the record as returned by the trial court; though it can, on proper suggestion, order a further return, or remit the record for correction, and enforce its orders. *Hay v. Lewis et al.*, 364
10. The sole office of a printed case is to present correctly the material parts of the record in a form convenient for the use of the court. *Ibid.*
11. A motion to strike from a printed case matter actually found in the record returned to this court, on the ground that such matter is not a proper part of the record, cannot be granted, and would be of no avail if granted. *Ibid.*
12. In an action for damages alleged to have accrued from defendant's negligence, a nonsuit was refused at the close of plaintiff's evidence, but granted after defendant's evidence was in. The bill of exceptions not being certified to contain all the evidence: *Held*, that the nonsuit must be presumed to have been justified by the evidence. *Greening v. Bishop*, 552

13. Under sec. 7, ch. 264 of 1860, this court loses jurisdiction of appeals in thirty days after judgment on them here, unless the jurisdiction is retained by order of the court for the purpose of a motion for rehearing, made within that time (*Pringle v. Dunn*, ante, p. 435); and this applies where the judgment here is one dismissing the appeal for noncompliance with the rules. *Pierce v. Kelly*, imp., 563
14. Where a motion for a rehearing is made after this court has lost jurisdiction of the action, it cannot entertain the motion, nor deny it with costs; and in such a case it denies the motion without costs. *Ibid.*
15. Where an appeal from a judgment brings up the question of costs in the trial court, and there is no bill of exceptions, that question must be determined from the pleadings and verdict; and all reasonable presumptions will be made to sustain the judgment. *Power v. Rockwell*, 585
16. In an action in the circuit court merely upon a *quantum meruit* for services, where the damages were laid above the jurisdiction of a justice's court, but the verdict for plaintiff awarded him less than \$50, this court would be obliged to treat the controversy as one cognizable by a justice. *Dunning v. Faulkner*, 10 Wis., 394. *Ibid.*
17. A justice cannot take jurisdiction of an action upon an express contract to pay a certain price for a certain amount of labor and materials, by computation exceeding \$600, averred to be wholly unpaid (19 Wis., 193; 36 id., 605); and where a complaint joined two causes of action, one upon a *quantum meruit* for services, and the other upon an express contract such as is above described, and the answer, after a general denial, pleaded a special defense to the latter count, confessing and avoiding such express contract, and the verdict was for less than \$50, and the plaintiff had judgment for full costs: *Held*, that the judgment will not be reversed, because it does not appear that the verdict was not for an amount found due plaintiff on such express contract, over and above an amount for which defendant established his special defense, in which case the plaintiff was entitled to his costs. *Ibid.*

APPEALABLE ORDER.

See CHANGE OF VENUE, 3. JUDGMENT (C.), 2.

APPROPRIATION OF PAYMENTS.

1. In the case of a creditor having several demands against the debtor, it is only where the latter makes a payment with opportunity to exercise his right to appropriate the same, and neglects to do so, that the creditor acquires the right of appropriation. *Jones et al., Adm'rs, v. Williams*, 300
2. Plaintiffs' decedent held a note of defendant, and also had charge of his mill, as an employee, and from time to time drew out money and charged it to himself in the day book kept at the mill. *Held*, that the amounts so taken and charged constituted cross demands or setoffs in defendant's favor, on an accounting between the parties, and were not payments of which defendant could make an appropriation, or to which the principles of the application of payments apply. *Ibid.*
3. In an action for the value of such decedent's services in the mill, therefore, it was error to instruct the jury that the moneys so taken might be ap-

plied as payments to the note, if the jury should find that defendant had not elected to apply them in payment of the services. *Ibid.*

ARBITRATION.

See CONSTITUTIONAL LAW, 6, 7.

ARREST.

See CONSTITUTIONAL LAW, 2.

1. In an action in the county court of Milwaukee county (which is a court of record) for a tort, the defendant was arrested upon an order of the judge of said court, made at chambers, upon an affidavit showing the tort. *Held*, that the arrest was lawful. *In re Kindling*, 35
2. When a defendant lawfully arrested on mesne process fails to give bail, or is surrendered by his bail, before judgment, his liability to detention on such process does not expire on the recovery of judgment against him in the action; but, unless otherwise discharged by the court, his detention must abide a *capias ad satisfaciendum*. *Ibid.*
3. What the prisoner's remedy would be, if, after judgment, the plaintiff should improperly and oppressively delay taking him in execution, is a question not raised by the writ of *habeas corpus* in this case. *Ibid.*

ARREST OF JUDGMENT.

See JUDGMENT (C.).

ATTACHMENT.

See LIEN (B.), II, 5, 6.

An order dissolving an attachment of property is reversed, on the ground that defendant's own affidavits plainly indicate an intent, participated in by all concerned adversely to the attachment, to place defendant's property beyond the reach of his creditors. *Flanders v. McDonald*, 288

ATTORNEYS-AT-LAW.

1. Whether the constitution of this state, by vesting the whole judicial power in the courts therein provided for, does not entrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts, *quære*. *Matter of Miss Goodell*, 232
2. To entitle any person to practice in this court, the statute requires that he shall be licensed by its order, and no right to such an order can be founded on admission to the bar of a circuit court. *Tay. Stats.*, ch. 119, §§ 31-33. *Ibid.*
3. The language of the statute relating to the admission of attorneys (which declares that "he shall first be licensed," etc.) applies to males only; and the statutory rule of construction, that "words of the masculine gender may be applied to females," "unless such construction would be inconsistent with the manifest intention of the legislature" (*R. S.*, ch. 5, sec. 1),

cannot be held to extend the meaning of this statute, in view of the uniform exclusion of females from the bar by the common law, and in the absence of any other evidence of a legislative intent to require their admission. *Ibid.*

4. There is nothing in the statutes of this state providing for the admission of females to the state university which shows a legislative intent to require the admission of females to the bar. *Ibid.*
5. Under ordinary circumstances, members of the bar of other states are permitted to argue causes in this court, without any general license to practice here. *Matter of Ole Mosness, Esq.*, 509
6. Members of the bar are officers of the court, and in some sense officers of the state for which the court acts. *Ibid.*
7. Officers charged with the general business of the state, within the state, must be residents of the state; and for all functions within the jurisdiction of the courts, officers of those courts must be residents of the state. *Ibid.*
8. If ch. 50 of 1855 (Tay. Stats., 1844-5, §§ 39, 40) was intended to do more than authorize the appearance here of members of the bar of other states as counsel in the trial and argument of causes, it was without the power of the legislature. *Ibid.*

BAILMENT.

See COMMON CARRIER. OFFICER. PLEDGE.

BANKRUPTCY.

1. In bankruptcy proceedings, the unintentional omission of a creditor from the schedule, or his failure to receive personal notice of the proceedings, does not render the discharge void as to him, or enable him to maintain an action on his demand in a state court. *Thomas v. Jones*, 124
2. It seems that a discharge in bankruptcy cannot be impeached in the state courts even on the ground of fraud, and that the only remedy is by application to the proper federal court to set aside the discharge; but it was not necessary to decide that question in this case. *Ibid.*

BAR.

See ATTORNEYS-AT-LAW.

BETTERMENT ACT.

1. Secs. 30-33, ch. 141, R. S., authorizing defendants in ejectment, in certain cases, to recover the value of their permanent improvements on the land, apply to an action in which the plaintiff recovers an undivided interest as *cotenant* of the defendant; and in such cases the court may apportion the expense of the improvements according to the respective interests of the parties. *Phœnix L. M. & S. Co. v. Sydnor et al.*, 600
2. Where an ejectment defendant has a valid claim for improvements under sec. 33 of said chapter, his lien for their value may be enforced in an in-

dependent action, so long as the statute of limitations has not run against it, and the property is owned by the ejectment plaintiff. *Ibid.*

3. But where it is sought to enforce such a claim under said section 33, in the *ejectment suit*, the proceedings for that purpose must be taken after verdict and *before judgment*, in analogy to the rule in cases under secs. 30-32, as established in *Scott v. Reese*, 33 Wis., 636. *Ibid.*

BILL OF EXCEPTIONS.

See APPEAL (C.), 1, 4, 11, 12.

BILLS AND NOTES.

See EVIDENCE, 2, 3.

1. A note by which the maker promises absolutely to pay to the order of the payee a sum certain, at a fixed time, such payment not being dependent upon a contingent event, nor out of a particular fund, is negotiable. *Kirk v. Dodge Co. Mut. Ins. Co.*, 133
2. Where such a note is given to an insurance company for the premium upon a policy of insurance, its negotiable character is not affected by a further agreement therein, that if it shall not be paid at maturity, the whole amount of premium on such policy shall be considered as earned, and the policy shall be void while the note remains overdue and unpaid. *Ibid.*
3. One who takes commercial paper, without notice, in absolute payment of a preexisting debt, is protected as a purchaser for value; and this, although he purchases for less than the face of the paper, unless the discount is so great as to show *mala fides*. *Heath v. Silverthorn L. M. & S. Co.*, 146
4. Where an instrument in the form of a negotiable promissory note of the defendant was not voluntarily made by her, but her signature was procured by a fraud practiced upon her, under pretense of getting her to sign a different note for a less sum, it was *not her note*, and she is not liable upon it, even to an innocent holder. *Griffiths v. Kellogg*, 290
5. Whether one who purchases commercial paper at a great discount, from a stranger, without indorsement and without making inquiry within his power, can always be held to be a *bona fide* purchaser, *quære*. *Ibid.*
6. The question whether defendant, who was unable to read the paper signed by her, was guilty of negligence to estop her from denying, as against a *bona fide* purchaser, that she made the note, having been fairly submitted to the jury, and the court below having refused a new trial after a verdict in her favor, this court would not reverse the judgment on the ground that she was guilty of such negligence, even if disposed to think differently from the jury. *Ibid.*

BOND.

See TOWN TREASURER, 3-7.

1. Before the bond secured by the mortgage in suit was made, the obligee and her husband conveyed to the obligor a farm, and in consideration of such conveyance said bond was executed, in the penal sum of \$900, and

conditioned that if the obligor, one year after the death of the obligee's husband, and annually thereafter during her natural life, should pay her the amount of the interest of \$464 at seven per cent. per annum, the bond should be void; but if any default should be made in the payment of said interest on any day whereon the same was payable, and it should remain unpaid for thirty days, the principal sum of \$464, with arrearages of interest, should, at the option of the obligee, become due and payable immediately; and that if the payments of interest were promptly made during the obligee's life, the debt and mortgage should cease at her death. *Held*,

(1) That notwithstanding the mention of \$900 as the penalty, the sum of \$464 which the obligor covenanted to pay upon breach, at the obligee's option, might in a proper case be treated as a penalty; and that in such case the measure of the obligee's recovery would be the gross value of the annuity when she declared her option, and arrears of interest.

(2) That as said sum of \$464 was not fixed to evade the usury law or other statutory provisions, or to cloak oppression, and as, independently of the stipulation, the damages would be uncertain, because the real value to this obligee of the payment of the stipulated annual interest cannot be determined by reference to any tables of mortality, or by any other means, said sum must be treated as *liquidated damages*, no facts appearing which would make it inequitable to enforce the contract according to its terms.

[RYAN, C. J., dissents, holding that the principal sum named is obviously greater than the value of the annuity could ever be; that it must be presumed, in the absence of all proof, that the annuitant could purchase the same annuity elsewhere at reasonably certain market rates; that the cost of such annuity is the precise measure of her damages; and that under such circumstances the sum named in the bond should be treated as a *penalty*.] *Berrinkott v. Traphagen et al., imp.*, 219

2. The interest which became due on said bond on the 16th of September of each of three successive years remaining unpaid, the obligee, on the 25th of November of the last of said years, notified the obligor, in writing, of her election to consider the principal sum, with arrearages of interest, due and payable immediately. The obligee resided in Dane county, Wisconsin, and the obligor in Nebraska. *Held*, that the option given could be exercised within a reasonable time after *any* default; and that, under the circumstances, the notice was served within a reasonable time. *Ibid.*

BURDEN OF PROOF.

See DIVORCE, 3. EVIDENCE, 2 (2), 14. INFANCY, 3.

CAPIAS AD RESPONDENDUM.

See ARREST. CONSTITUTIONAL LAW, 2.

CAPIAS AD SATISFACIENDUM.

See ARREST, 2, 3.

"CASH."

See INSURANCE (C.), 4.

VOL. XXXIX. — 44

CASES CITED, ETC.

Achtenhagen v. Watertown,	- - -	18:347,(V. & B's ed., note),	187
Etna Co. v. McCormick,	- - -	20:265,	499
Allerding v. Cross,	- - -	15:530,	440, 441
Anderson v. Coburn,	- - -	27:558,	316
Andrews v. Hart,	- - -	17:297,	156
Antisdel v. C. & N. W. R'y Co.,	- - -	26:145,	134
Att'y Gen. v. Lum,	- - -	2:507,	440
Att'y Gen. v. McDonald,	- - -	3:805,	58, 392
Att'y Gen. v. R. R. Companies,	- - -	35:425,	102, 528
Austin v. Holt,	- - -	32:478,	550
Bach v. Parmely,	- - -	35:238,	434
Baker v. Beach,	- - -	15: 99,	496, 498, 519
Ballston Spa Bank v. Marine Bank,	- - -	18:490,	287
Bange v. Flint,	- - -	25:544,	156, 157
Barden v. Supervisors,	- - -	33:445,	447, 664
Barker v. Dayton,	- - -	28:387,	171, 669
Bass v. R'y Company,	- - -	36:455,	642
Bateman v. Johnson,	- - -	10: 1,	338
Bates v. Campbell,	- - -	25:613,	187
Bates v. Chesebro,	- - -	32:594,	506
Bates v. Chesebro,	- - -	36:636,	506
Benedict v. Horner,	- - -	13:256,	355
Bevier v. Dillingham,	- - -	18:529,	661
Bigelow v. Doolittle,	- - -	36:115,	461
Blackburn v. Sweet,	- - -	38:578,	316
Blackwood v. Jones,	- - -	27:498,	263
Blake v. Coleman,	- - -	22:415,	141
Blodgett v. Hitt,	- - -	29:170,	612, 650
Bonnell v. Gray,	- - -	36:574,	313, 418
Bonnell v. Jacobs,	- - -	36: 59,	251
Boothby v. Scales,	- - -	27:626,	251
Bowen, In re,	- - -	20:300,	60
Boyle, In re,	- - -	9:264,	396
Brayton v. Jones,	- - -	5:627, (2d ed. note),	353, 677
Brown v. Remington,	- - -	7:462,	487
Bull v. Conroe,	- - -	3:233,	573
Bullwinkel v. Guttenberg,	- - -	17:583,	333
Burns v. Town of Elba,	- - -	32:605,	136
Butler v. Carns,	- - -	37: 61,	294
Butler v. The Regents, etc.,	- - -	23:124,	87
Button v. Schroyer,	- - -	5:598,	495, 519
Callanan v. Judd,	- - -	23:343,	58
Campbell v. Campbell,	- - -	37:206,	665
Chapin v. Crusen,	- - -	31:209,	527
Chipman v. Tucker,	- - -	38: 43,	294
Clark v. Drake,	- - -	3 Pin.: 228,	353
Colburn v. Harvey,	- - -	18:147,	60
Cole v. Cole,	- - -	27:531,	172
Conger v. Chamberlain,	- - -	14:258,	355
Connaughton v. Sands,	- - -	32:387,	341
Conroe v. Bull,	- - -	7:408,	58, 392
Cooban v. Bryant,	- - -	36:605,	589
Cord v. Hirsch,	- - -	17:403,	661
Cornell v. Hichens,	- - -	11:353,	156
Cothren v. Connaughton,	- - -	24:134,	510

Cotton v. Sharpstein,	-	-	14: 226,	-	-	60
Couillard v. Johnson,	-	-	24: 593,	-	-	312
Craker v. R'y Company,	-	-	36: 657,	-	-	641
Cramer v. Noonan,	-	-	4: 231,	-	-	487
Craven v. Craven,	-	-	27: 418,	-	-	660
Cremer v. Town of Portland,	-	-	36: 92,	-	-	136, 677
Croft v. Bunster,	-	-	9: 503,	-	-	156
Crosby v. Roub,	-	-	16: 616,	-	-	156
Cunningham v. Lyness,	-	-	22: 245,	-	-	136
Cutler v. Howard,	-	-	9: 306,	-	-	665
Davis v. Louk,	-	-	30: 308,	-	-	611
Day, In re,	-	-	34: 638,	-	-	238
DeWitt v. Perkins,	-	-	22: 473,	-	-	157
Dietrich v. Koch,	-	-	35: 618,	-	-	354
Dole v. Northrop,	-	-	19: 249,	-	-	146
Downer v. Miller,	-	-	15: 612,	-	-	650
Draper v. Emerson,	-	-	22: 147,	-	-	663
Dudley v. Ross,	-	-	27: 679,	-	-	461
Dunning v. Faulkner,	-	-	10: 394,	-	-	589
Dupont v. Davis,	-	-	30: 170,	-	-	648
Dupont v. Davis,	-	-	35: 631,	-	334, 354,	545
Eaton v. North,	-	-	25: 514,	-	-	355
Estey v. Sheckler,	-	-	36: 434,	-	441, 442,	570
Ewen v. R'y Company,	-	-	38: 613,	-	-	661
Fairbank v. Cudworth,	-	-	33: 358,	-	-	519
Felt v. Felt,	-	-	19: 193,	-	-	589
Fenelon, In re,	-	-	37: 231,	-	-	237
Ferson v. Drew,	-	-	19: 225,	-	-	355
Fisher v. Fisher,	-	-	5: 472,	-	-	379
Fitzpatrick v. Cottingham,	-	-	14: 219,	-	226,	231
Fitzsimmons v. City Fire Ins. Co.,	-	-	18: 234,	-	-	491
Flanders v. Cottrill,	-	-	36: 564,	-	-	677
Fobes v. School District,	-	-	10: 117,	-	-	677
Freeman v. Carpenter,	-	-	17: 126,	-	-	661
Freeman v. Transportation Co.,	-	-	36: 571,	-	-	558
Gardinier v. Kellogg,	-	-	14: 605,	-	-	677
Gee v. Swain,	-	-	12: 450,	-	-	677
Gibbs v. Larabee,	-	-	23: 495,	-	-	60
Giffert v. West,	-	-	33: 617,	-	-	251
Gilman v. Williams,	-	-	7: 329,	-	574,	575
Gill, In re,	-	-	20: 636,	-	-	59
Gleason v. Gleason,	-	-	4: 64,	-	-	657
Gorton v. Dodge County Mut. Ins. Co.,	-	-	39: 121,	-	-	115
Gough v. Dorsey,	-	-	27: 119,	-	58,	392
Grant v. Hardy,	-	-	33: 668,	-	-	424
Green v. Gilbert,	-	-	21: 395,	-	-	557
Haas v. Weinhausen,	-	-	30: 326,	-	-	339
Hackett v. Carter,	-	-	38: 394,	-	-	339
Hafern v. Davis,	-	-	10: 501,	-	-	418
Haight v. Lucia,	-	-	36: 355,	-	-	237
Hall v. Finch,	-	-	29: 278,	-	379, 380,	332
Hall v. Hall,	-	-	25: 600,	-	658,	662
Hanson v. Edgar,	-	-	34: 653,	-	-	514
Hanson v. Michelson,	-	-	19: 499,	-	-	146
Harbeck v. Southwell,	-	-	18: 418,	-	-	661
Hawes v. Town of Fox Lake,	-	-	33: 438,	-	-	136
Hays v. Lewis,	-	-	21: 663,	-	-	397
Heath v. Heath,	-	-	31: 223,	-	-	664

Heath v. Keyes, - - -	35: 668,	- - -	341
Heidenheim v. Sprague, - - -	5: 259,	- - -	315
Hill v. Hoover, - - -	5: 386,	- - -	439, 440
Hopkins v. Gilman, - - -	23: 512,	- - -	441
Horner v. R'y Co., - - -	38: 174,	- - -	355
Houfe v. Town of Fulton, - - -	29: 296,	- - -	136
Howell v. Howell, - - -	15: 55,	- - -	448
Hubbell v. Hubbell, - - -	3: 662,	- - -	657, 660
Huebschmann v. McHenry, - - -	29: 655,	- - -	518, 519
Hundhausen v. Atkins, - - -	36: 250,	- - -	289
Hungerford v. Cushing, - - -	8: 324,	- - -	439
Hutchinson v. Supervisors, - - -	26: 402,	- - -	449
Ilaley v. Harris, - - -	10: 95,	- - -	60
Jackman Will Case, - - -	26: 364,	- - -	103
Jackman Will Case, - - -	27: 409,	- - -	339
Jalie v. Cardinal, - - -	35: 118,	- - -	137
Jarvais v. Moe, - - -	38: 440,	- - -	575, 658
Jarvis v. Barrett, - - -	14: 591,	- - -	316
Jarvis v. McBride, - - -	18: 316,	- - -	648
Jarvis v. Peck, - - -	19: 74,	- - -	354, 355
Johnson v. Wilson, - - -	1 Pin: 65,	- - -	418
Joliffe v. Madison Mut. Ins. Co., - - -	39: 111,	- - -	123
Jones v. Walker, - - -	22: 220,	- - -	146
Kaye v. Crawford, - - -	22: 320,	- - -	379
Kellam v. Toms, - - -	38: 592,	- - -	316
Kelley v. Fond du Lac, - - -	31: 179,	- - -	677
Kellogg v. Steiner, - - -	29: 626,	- - -	294
Kent v. Agard, - - -	24: 378,	- - -	481
Kimball v. Noyes, - - -	17: 695,	- - -	661
Krause v. Krause, - - -	23: 354,	- - -	165
Kuntz v. Kinney, - - -	33: 510,	- - -	575
Ladd v. Hilderbrand, - - -	27: 135,	- - -	206
Lamonte v. Pierce, - - -	34: 483,	- - -	288
Landon v. Burke, - - -	36: 378,	- - -	519
Langhoff, Adm'r, v. R'y Co., - - -	19: 489,	- - -	136
Lansing v. Carpenter, - - -	9: 541,	- - -	487
Laubenheimer v. Mann, - - -	19: 519,	- - -	226
Laude v. C. & N. W. R'y Co., - - -	33: 640,	- - -	135
Laver v. McGlachlin, - - -	28: 364,	- - -	396
Law v. Grant, - - -	37: 548-568,	- - -	506
Lawton v. Howe, - - -	14: 241,	- - -	355
Lefebvre v. Utter, - - -	22: 189,	- - -	662
Lego v. Shaw, - - -	38: 401,	- - -	339
Lombard v. Cowham, - - -	34: 486,	- - -	354, 355
M. W. & M. Plankroad Co. v. Reynolds, - - -	3: 287,	- - -	527
Main v. Bell, - - -	27: 517,	- - -	341, 342
Manley v. Manley, - - -	3 Pin.: 390,	- - -	657
Marsh v. Fraser, - - -	37: 149,	- - -	180
Martin v. Pugh, - - -	23: 184,	- - -	661
Matteson v. Ellsworth, - - -	28: 254,	- - -	355
Maxwell v. Reed, - - -	7: 582,	- - -	573
McCall v. Chamberlain, - - -	13: 637,	- - -	184, 185, 196
McConihe v. Hollister, - - -	19: 269,	- - -	355
McLean v. Cook, - - -	23: 364,	- - -	333
Mead v. Bagnall, - - -	15: 162,	- - -	677
Mecklem v. Blake, - - -	22: 495,	- - -	448
Merriam v. Field, - - -	24: 640,	- - -	582
Merriam v. Field, - - -	29: 592,	- - -	583

M. E. Church of Sun Prairie v. Sherman,	98: 404,	-	-	-	65
Moir v. Dodson,	14: 279,	-	-	-	418, 661
Montgomery v. Town of Scott,	34: 338,	-	-	-	136
Morgan v. Hammett,	23: 30,	-	-	-	650
Morse v. Buffalo F. & M. Ins. Co.,	30: 534,	-	95, 102, 119,	-	356
Morrow v. Campbell,	30: 90,	-	-	-	505
Morrow v. Reed,	30: 81,	-	-	-	505
Moul v. Moul,	30: 203,	-	-	-	172
Mountain v. Fisher,	22: 93,	-	-	-	379, 382
Mowry, In re,	12: 52,	-	-	-	62
Mundt v. S. & F. R. R. Co.,	31: 451,	-	-	-	430, 431
Munger v. Lenroot,	32: 541,	-	-	-	266
Newton v. Howe,	29: 531,	-	-	-	573
Noonan v. Orton,	30: 609,	-	-	-	456
Noonan v. Orton,	34: 259,	-	-	-	662
Orton v. Noonan,	25: 672,	-	-	-	664
Parker v. Kane,	4: 12,	-	-	-	448
Pellage v. Pellage,	32: 136,	-	379, 380,	-	382
Perkins v. Fond du Lac,	34: 435,	-	-	-	136
Perkins v. Simonds,	28: 90,	-	-	-	204, 205
Pelton v. Knapp,	21: 63,	-	-	-	650
Phillips v. Phillips,	22: 256,	-	-	-	660
Pierce v. Jung,	10: 30,	-	-	-	226, 231
Pierce v. Kneeland,	14: 341,	-	-	-	440
Pringle v. Dunn,	37: 449,	-	-	-	439, 648
Pringle v. Dunn,	39: 435,	-	-	-	569, 577
Putnam v. Sweet,	2: 302,	-	-	-	58, 239
Quinn v. Quinn,	27: 168,	-	-	-	662
Ralph v. C. & N. W. R'y Co.,	32: 178,	-	-	-	325
Raymond v. Holborn,	23: 57,	-	-	-	650
Remington, In re,	7: 643,	-	-	-	59
Resch v. Senn,	31: 138,	-	-	-	355
Robbins v. Deverill,	20: 142,	-	-	-	661
Roberts v. McGrath,	38: 52,	-	-	-	294
Roberts v. Wood,	38: 60,	-	-	-	294
Ruthe v. R. R. Co.,	37: 344,	-	-	-	315
Ryan v. Martin,	16: 57,	-	-	-	226
Sabine v. Fisher,	37: 376,	-	-	-	418
Sage v. McLean,	37: 357,	-	-	-	354
Sanford v. McCreedy,	28: 108,	-	-	-	661
Savage v. Davis,	18: 608,	-	-	-	494
Sayles v. Davis,	20: 302,	-	-	-	397
Scott v. Reese,	36: 636,	-	-	-	612, 613
Seatoff v. Anderson,	28: 212,	-	-	-	519
Sewell v. Eaton,	6: 490,	-	-	-	505
Shafer v. Bushnell,	24: 372,	-	-	-	657, 660
Single v. Schneider,	30: 570,	-	-	-	460
Smith v. Packard,	12: 371,	-	-	-	443
Smith v. Peckham,	39: 414,	-	-	-	662
Smith v. Wood,	12: 382,	-	-	-	369, 370
Spafford v. Janesville,	15: 474,	-	-	-	441, 443
Spaulding v. R'y Co.,	30: 110,	-	-	-	60
Spraggon v. McGreer,	14: 439,	-	-	-	648
Sprague v. Birchard,	1: 457,	-	-	-	333
State v. Bloom,	17: 521,	-	-	-	396
State v. Braum,	31: 600,	-	-	-	355
State v. Brophy,	38: 413,	-	-	-	287
State v. Chappell,	10: 10,	-	-	-	287

State ex rel. Walsh v. Dousman,	28: 542,	-	-	532
State v. Murray,	28: 96,	-	-	511
State v. Mushied,	12: 561,	-	-	287
State v. Richter,	37: 275,	-	-	333
State ex rel. Peck v. Riordan,	24: 484,	-	-	532
State ex rel. Martin v. Secretary of State,	38: 92,	-	-	282
State v. Smith,	14: 497,	-	-	511
State v. Supervisors,	34: 169,	-	-	355
State ex rel. Keenan v. Supervisors,	25: 339,	-	-	532
State ex rel. Wolff v. Supervisors,	29: 79,	-	-	448
State v. Tierney,	23: 430,	-	-	355
State v. Winn,	19: 304,	-	-	333
Stevens v. Campbell,	13: 376,	-	-	157
Stewart v. Mather,	32: 344,	-	-	424
Stowell v. Eldred,	26: 504,	-	-	595, 633
Strachan v. Muxlow,	31: 207,	-	-	72
Streubel v. M. & M. R'y Co.,	12: 67,	-	-	430
Stroud v. Stevens Point,	37: 367,	-	-	523
Sturtevant v. Starin,	19: 268,	-	-	433, 434
Supervisors v. Hackett,	21: 613,	-	-	662
Sydnor v. Palmer,	29: 253,	-	-	543, 544
Tarbox v. Supervisors,	34: 558,	-	-	418, 447, 664
Taylor Orphan Asylum, In re,	36: 534,	-	-	424
Thomas v. Rewey,	36: 328,	-	-	612, 613
Thomas v. Steele,	22: 207,	-	-	510
Thompson v. Jones,	4: 106,	-	-	648
U. S. ex rel. Noyes v. Hatch,	1 Pin.: 182,	-	-	85
Van Doran v. Armstrong,	28: 236,	-	-	678
Von Baumbach v. Bade,	9: 559,	-	-	448
Wagners v. Lathers,	26: 436,	-	-	60
Walker v. Ebert,	29: 194,	-	-	294
Ward v. Perigo,	33: 143,	-	-	141
Ward v. Town of Jefferson,	24: 342,	-	-	135
Warner v. Heiden,	28: 517,	-	-	433
Waterman v. Raymond,	5: 185,	-	-	58
Weber v. Zeimet,	27: 685,	-	-	146
Webster v. Moe,	35: 74,	-	-	460
Welch v. Welch,	33: 534,	-	-	171
West v. Ward,	26: 579,	-	-	575
Wheeler v. Smith,	18: 651,	-	-	418
Wheeler v. Town of Westport,	30: 392,	-	-	136
Whialer v. Wilkinson,	22: 572,	-	-	526
Whitney v. Gunderson,	31: 359,	-	-	187
Wilcox v. Bates,	26: 465,	-	-	431
Williams v. Williams,	36: 362,	-	-	172
Wilson v. Henry,	35: 241,	-	-	550
Wilson v. Jarvis,	19: 597,	-	-	661
Winslow v. Crowell,	35: 639,	-	-	658
Witter v. Lyon,	34: 564,	-	-	287, 288
Wittman v. Watry,	37: 233,	-	-	662
Wood v. Crocker,	18: 345,	-	-	455
Wood v. R'y Co.,	27: 541,	-	-	454
Wood v. Trask,	7: 566,	-	-	498
Woodle v. Whitney,	23: 55,	-	-	250
Wright v. Pratt,	31: 99,	-	-	575
Yates v. Shepardson,	27: 244,	-	-	176
Yenner v. Hammond,	36: 277,	-	-	225, 229
Young v. French,	35: 111,	-	-	268
Young v. Groner,	22: 205,	-	-	166, 312

CASES OVERRULED, CRITICISED, ETC.

1. *Ballston Spa Bank v. Marine Bank*, 18 Wis., 490; *Witter v. Lyon*, 34 id., 564; *Lamonte v. Pierce*, id., 483; and *In re Day*, id., 638, as to appeals from orders made in proceedings for contempts, distinguished from this case, where the order or judgment imposed a fine as for a criminal contempt. *In re Murphey*, 286-288
2. *Blackwood v. Jones*, 27 Wis., 498, as to form of affidavit for an attachment against goods under the general attachment law, distinguished from this case, where the attachment was to enforce a laborer's lien on logs. *Winslow et al. v. Urguhart*, 260, 268-9
3. *Haight v. Lucia*, 36 Wis., 355, as to the appealability of orders imposing fines for criminal contempts, disapproved. *In re Murphey*, 286-288
4. *In re Boyle*, 9 Wis., 264; *State v. Bloom*, 17 id., 521, and *Laver v. McGlachlin*, 28 id., 361, in which the court upheld judgments of judges *de facto*, and not *de jure*, distinguished from this cause, in which the person who tried the case was not in possession of the office of judge, and did not claim it. *Van Slyke v. Mut. Fire Ins. Co.*, 390, 396
5. *In re Day*, 34 Wis., 638. See No. 1, *supra*.
6. *Jarvis v. Peck*, 19 Wis., 74, as to counterclaim based on defendant's legal title in an action, by one in possession, to quiet his title, distinguished from this case, wherein defendant in *ejectment* attempted to set up a counterclaim based on his legal title. *Lau v. Hyde*, 345, 354
7. *Lamonte v. Pierce*, 34 Wis., 483. See No. 1, *supra*.
8. *Laver v. McGlachlin*, 28 Wis., 361. See No. 4, *supra*.
9. *McCall v. Chamberlain*, 13 Wis., 637. Query as to the precise import, and the correctness of that decision, as to the absolute liability of a railway company for cattle killed by its trains, where it has neglected to maintain proper fences and cattle guards. *Pitzner v. Shinnick*, 129, 134-6
10. *Mountain v. Fisher*, 22 Wis., 98, criticised, as to the liability of one who receives an infant into his family as a child, where the services as such infant are rendered "in expectation" of being paid for them. *Tyler v. Burrington*, 376, 382
11. *Spraggon v. McGreer*, 14 Wis., 439, as to sufficiency of notice of *lis pendens*, distinguished. *Watson v. Wilcox, imp.*, 643, 648
12. *State v. Bloom*, 17 Wis., 521. See No. 4, *supra*.
13. *State ex rel. Wolff v. Sup'rs of Sheboygan Co.*, 29 Wis., 79. A remark therein as to the limitation of actions against counties, under acts of 1867 and 1868, to recover moneys paid upon defective tax certificates, — overruled. *Baker v. Sup'rs of Columbia Co.*, 444, 448

CHANGE OF VENUE.

1. In a divorce suit not commenced in the county of defendant's residence, he is entitled to have the venue changed to that county, notwithstanding

- ing plaintiff's affidavit that the circuit judge thereof is prejudiced against her; although, upon renewal of such affidavit after the change of venue, she may be entitled to have the cause sent out of that circuit for trial. *Moe v. Moe*, 308
2. Where the summons is served on the defendant in his own county, his demand that the venue be changed to that county (under sec. 4, ch. 123, R. S.) does not operate as a stay of proceedings; and the court in which the action is, has authority, pending the motion for the change of venue, to order payment of temporary alimony and suit money. *Bonnell v. Gray*, 36 Wis., 574, followed. *Ibid.*
 3. An order refusing to change the place of trial on account of the prejudice of the people of the county in which the action was brought, is appealable, and it may also be reviewed on appeal from the final judgment; and one such order made in an action does not bar a second like motion by the same party on the same ground. *Hackett v. Carter*, 38 Wis., 394. *Schattschneider v. Johnson et al.*, 387
 4. The granting of a change of venue in such cases rests in the sound discretion of the court, acting upon its own knowledge and observation as well as upon the proofs presented; and its decision will not be reversed except for an abuse of discretion. *Ibid.*
 5. Whether the petition of a party to an action, representing the judge to be related to the parties and necessarily and insensibly prejudiced in the case, but not praying a change of venue, properly raises the question of prejudice, is not here decided. *Van Slyke v. Mut. Fire Ins. Co.*, 390
 6. Although the statute (R. S., ch. 123, sec. 8) gives a party to an action the right to a change of the place of trial on the ground that the judge is prejudiced, and not because such party believes or fears that he is so, yet when the application is made to the judge whose prejudice is alleged, although alleged only upon belief, the place of trial must be changed, the statute making the averment in such case conclusive proof. *Seehawer v. City of Milwaukee*, 409
 7. Under sec. 5, ch. 352 of 1860 (as reenacted by sec. 1, ch. 280 of 1873), in an action commenced in the circuit court for Milwaukee county, if either party entitles himself to a change of the place of trial for any of the reasons mentioned in said statute, the action must be sent to the county court of the same county, "unless it shall appear" that one of the same objections exists to trying such action before the judge of the county court. *Held*, that the affidavit of the party to the prejudice of the county judge is not conclusive in such a case, but the averment is traversable and subject to be adjudicated by the circuit court. *Ibid.*
 8. No argument adverse to the foregoing conclusion can be drawn from ch. 95, R. S. of 1849; that statute having been repealed by sec. 1, ch. 191, R. S. of 1858, although preserved in the appendix to that revision. *Ibid.*

CITIES.

See CORPORATIONS (B.), 1.

COMMERCIAL LAW.

See AGENCY. APPROPRIATION OF PAYMENTS. BANKRUPTCY. BILLS AND NOTES. BOND. COMMON CARRIER. CONTRACTS. CONVERSION. EQUITY, 3-6. EVIDENCE, 2, 3, 6-8, 12, 14-16. INSURANCE. INTEREST. LIEN. PARTNERSHIP. PLEDGE. SALES. WAIVER, 1. WARRANTY.

COMMON CARRIER.

1. Where goods carried by a railroad company to their place of destination and there deposited in its warehouse, are kept safely for the consignee until he has had reasonable time to remove them, and are afterwards destroyed by fire, the company is not liable for them as a common carrier. *Lemke v. Ch., Mil. & St. P. R'y Co.*, 449
2. In the absence of proof to the contrary, the presumption is that goods are ready for delivery to a consignee at any time after they are received at the carrier's depot at their place of destination. *Ibid.*
3. The question whether the consignee had a reasonable time to remove his goods should be submitted to the jury, under proper instructions, when there is a conflict of evidence in respect to material facts bearing upon it, or when the facts are doubtful or complicated and the court cannot satisfactorily determine their weight or importance. But when the facts are few and simple, and are conclusively established by a special finding or by the undisputed evidence, the question of a reasonable time is for the court. *Ibid.*
4. Plaintiff's goods, shipped by defendant's road to Watertown, were received at the Watertown depot at 5:30 P. M., of Saturday, and were destroyed by fire in said depot about noon of the following Tuesday. Held, that plaintiff had a reasonable time to remove the goods, and defendant was not liable as a carrier. *Ibid.*
5. The fact that the consignee was absent from Watertown during most of the period between the arrival and destruction of the goods, could not extend the time during which defendant held them as a common carrier. *Ibid.*

COMPLAINT.

See ADMINISTRATORS, etc., 5, 6. EJECTMENT, 1, 2. PLEADING, 2-4.

CONDITION SUBSEQUENT.

See DEED, 4-7.

CONSTITUTIONAL LAW.

See ATTORNEYS-AT-LAW, 1, 7, 8. FRANCHISES, 2. LIEN (B.), II, 1.

1. The judges of the courts of record of this state take, under the constitution creating their offices, the powers of judges of such courts at the common law, including the powers commonly possessed by them at chambers at the time of the adoption of the constitution. *In re Kindling*, 35
2. Such judges have power, under the constitution, to make orders at chambers to hold to bail, in proper cases, that being the established practice when the constitution was adopted. *Ibid.*
3. Where a legislative act creates a public office, appoints the officer, and appropriates money to pay his salary, a subsequent repeal of the act terminates both the office and the right of the appointee to any salary not already earned at the time of such repeal. *Hall v. The State*, 79

4. The repeal of such an act does not impair the obligation of contracts within the meaning of subd. 1, sec. 10, art. I of the federal constitution. *Ibid.*
5. The commissioners appointed by ch. 40 of 1857, to make a geological survey of the state, were public officers; and their offices were abolished by the subsequent unconditional repeal of the act, notwithstanding the contracts entered into with them by the governor in behalf of the state; and plaintiff cannot recover any salary for services alleged to have been rendered under the contract with him since such repeal. *Ibid.*
6. Whether ch. 323 of 1874 was designed to submit the plaintiff's claim against the state to arbitration, and make the report of the commissioners there named binding upon the state as an award, and whether the legislature has power to make such a submission, *quære. Carpenter v. The State*, 271
7. Said act contravenes sec. 6, art. IV of the state constitution, and the award of the commissioners under it is void, because it assumes to compensate the plaintiff for work done and materials furnished to the state under a contract, not at the prices specified in the contract, but by the rule of *quantum meruit* or *quantum valebant*. *Ibid.*
8. The "extra compensation" to contractors with the state, forbidden by the constitution, includes all compensation *outside* of that provided for by the contract, and it is not necessary to determine whether the compensation allowed by the act of 1874 was *greater* than that fixed by the plaintiff's contract. *Ibid.*
9. The constitution of this state having vested all judicial jurisdiction in courts and justices of the peace, and provided for the election of judges of all courts, the legislature can confer no judicial jurisdiction on other officers or persons, exceeding power not exceeding that of a circuit judge at chambers, on court commissioners. *Van Slyke v. Mut. Fire Ins. Co.*, 390
10. Ch. 69, Laws of 1870, which authorizes parties to avoid a change of venue for prejudice of the circuit judge, by stipulating that a member of the bar of this court shall act as judge in the case, with all the powers and duties of a circuit judge, is void. *Ibid.*
11. On appeal from a judgment signed by the clerk, where the record here shows that on the trial of the cause in the court below the judge of that court left the bench, and that his place was assumed by another person, a member of the bar of this court, but not a judge, who tried the cause, and upon whose consideration the judgment was rendered, this court cannot *presume* that such judgment rests upon a proper trial of the issue, but must treat the proceeding as *coram non judge*, and the judgment as void. *Ibid.*
12. *In re Boyle*, 9 Wis., 284; *State v. Bloom*, 17 id., 521; and *Laver v. McGlachlin*, 23 id., 361, in which the court upheld the judgments of judges *de facto*, and not *de jure*, distinguished from this case, in which the person who tried the cause was not in possession of the office of judge, and did not claim it. *Ibid.*
13. The judgment, having proceeded upon a mistrial, and not being a proper judgment of the court below, whether it is void or voidable, must be reversed. *Ibid.*
14. Ch. 458, P. & L. Laws of 1869, which attempts to take from the possession and control of the town officers in Chippewa county a portion of the moneys raised in their towns for highway purposes, and entrust its ex-

penditure to the county board, contrary to the general law (ch. 19, R. S.), violates sec. 23, art. IV of the state constitution, which requires the system of town and county government to be as nearly *uniform* as practicable. *McRae v. Hogan et al.*, 539

CONSTRUCTION.

1. *Of Contracts.*

See CONTRACTS, 4, 8.

2. *Of Public Records.*

See CORPORATIONS (B.), 2-4.

3. *Of Statutes.*

See ATTORNEYS-AT-LAW, 3, 4. TOWN TREASURER, 5.

CONTEMPT.

See CRIMINAL LAW, 2.

"CONTRACTOR."

See RAILROADS, 2.

CONTRACTS.

See AGENCY. BILLS AND NOTES. BOND. COMMON CARRIER. CONSTITUTIONAL LAW, 3-7. CONVERSION, 4, 5. CORPORATIONS (A.) DEED. EQUITY, 2-6. EVIDENCE, 2, 12, 13, 14. INFANCY. INSURANCE. LIEN. MINES, etc. OFFICER. PARTNERSHIP. PLEDGE. RAILROADS. SALES. SPECIFIC PERFORMANCE. SUBROGATION. TOWN TREASURER, 3-7. VENDOR AND PURCHASER. WAIVER, 1. WARRANTY.

1. An order for materials and work may be revoked at any time before acceptance; and where a revocation is shown, it will be *presumed* to have been in time, until the contrary appears. *Johnson v. Filkington*, 62
2. Under ch. 243 of 1862 (Tay. Stats., 836, § 14 and 1942, § 21), the first day of January is a legal holiday in this state. *Siegbert et al. v. Stiles*, 533
3. By ch. 243 of 1861 (Tay. Stats., 836, § 12), commercial paper maturing on Sunday or on a legal holiday becomes due and payable on the next preceding secular day; and by analogy to this statute, where any other contract by its terms matures on a Sunday or legal holiday, it will be held to mature on the next preceding secular day. *Ibid.*
4. Where one hires a man and his wife to *live in his family* and work for him, this is a contract for their *personal services*. *Jennings v. Lyons*, 553
5. In general, in case of an *entire* contract, the party claiming under it must show *full performance* on his part; but full performance is excused where rendered impossible by the act of God, or of the law, or of the other party to the contract. *Ibid.*
6. Sickness or death is an act of God in such a sense as generally to excuse full performance of an entire contract, and permit a recovery on a *quantum meruit*; but otherwise where the sickness is one which should have been foreseen and provided against by the party in default. *Ibid.*

7. Plaintiff contracted to render to defendant the domestic services of himself and wife for one year, at a specified price. Four months and ten days thereafter the wife left the service in anticipation of her confinement; both were then discharged from the service, and the wife was confined four or six weeks thereafter. *Held*, that plaintiff was not excused by such sickness, which he should have foreseen, and cannot recover on a *quantum meruit*. *Ibid.*
8. By contract under seal, A. covenanted with B. to sell and deliver to the latter, "milk and cream of good quality and in sufficient quantity for his use in the hotel kept by him and known as the 'Park Hotel,' said milk and cream to be daily furnished and delivered" at specified prices; and B. covenanted to purchase of A., at said prices, "all the milk and cream that he may use in the hotel kept by him, known as the 'Park Hotel,' and to pay for the same at the end of each month, in full." B. had a lease of said hotel for five years from the date of said contract. A little more than a year from that date, he refused to receive any more milk or cream from A., and thenceforth purchased those articles from other persons for use in his said hotel. Upon A.'s claim for damages for breach of such contract, *Held*:
 - (1) That the contract being silent as to its duration, either party might terminate it at pleasure upon reasonable notice; and parol evidence that the contract was for a specific time, was inadmissible.
 - (2) That, as no question of notice was made on the trial, the court should have charged that when B. terminated the contract, he had a legal right to do so.
 - (3) That, although B.'s evidence of a contemporaneous oral agreement that the contract should terminate in one year was improperly admitted, still, as A. was not injured thereby, a verdict against him will not be disturbed. *Irish v. Dean*, 562
9. The rule, that a contract under seal, executed by an agent in his own name, does not bind, nor confer any rights upon, the principal in whose behalf it was really made, when he is not named therein, is subject to many exceptions. *Stowell et al. v. Eldred*, 614
10. Thus, where the instrument *would be valid without a seal*, it is to be treated, though in fact under seal, as mere evidence of a simple contract. *Ibid.*
11. The rule which forbids the terms of a written contract to be changed by parol evidence, will not prevent one not a party to the contract from showing that he has rights under it because it was entered into for his benefit; though neither party to the contract can show, for the purpose of relieving himself from liability thereon, that one of them was a mere agent for a third person. *Ibid.*
12. One F., in his own name, entered into a contract under seal with plaintiffs for the purchase of a judgment recovered by the latter against defendant, in Illinois. By the terms of the contract, the judgment was to be paid for in certain property and certain sums of money for which F. then gave his notes; it was to be assigned to F. when all the payments should be fully made; and, in case of his default, plaintiffs might declare the agreement void, and all previous payments forfeited. After payments on the contract amounting to \$4,100, F. made default, and plaintiffs notified him of their election to consider the agreement void and the payments forfeited, but did not offer to return his notes for the amount unpaid. In this action on the Illinois judgment, defendant set up as a defense in part, that F. made the above described agreement with plaintiffs as defendant's agent, and for his benefit; and that the money and property

paid by F. upon such agreement belonged to defendant, who had thus, through F. as his agent, *paid plaintiffs on their judgment* said sum of \$4,100. *Held,*

(1) That plaintiffs, not having offered to return F.'s notes before the trial, never exercised in a valid manner their option to consider the contract with him void and payments thereon forfeited.

(2) That until defendant asserted his rights under said contract as principal, F., in a suit by him for specific performance, upon tendering payment of the balance due thereon, might have compelled an assignment to him by plaintiffs of the Illinois judgment.

(3) Whether equity would have relieved against the forfeiture, if plaintiffs, upon giving notice of their election as above stated, had offered to surrender to F. his notes, is not here determined.]

(4) That defendant's rights are coextensive with those which F. would have in such a suit by him to compel a specific performance by plaintiffs of their contract; and, as equivalent to a decree that plaintiffs assign the judgment to F. for his benefit, defendant would be entitled in this action, upon a proper counterclaim in equity, after tendering, or paying into court, the amount equitably due, to a decree declaring the judgment satisfied, and restraining its further collection.

(5) That as the answer alleges *payments on the judgment as a legal defense*, instead of setting up the facts by way of equitable counterclaim, evidence of such facts should have been rejected, as not tending to establish such legal defense. *Ibid.*

CONVERSION.

See PLEDGE, 2.

1. In an action for the conversion of a dwelling house removed from the lot on which it was built to other land, the presumption is that it had been attached to the former lot and became attached to the latter, so as to form in each case part of the realty. *Northrup v. Trask*, 515
2. The person who removed the house not having been a mere trespasser, but the equitable owner of the house and of the lot on which it was built, the house, while *in transitu* between the two lots, was personalty, the subject of conversion. *Huebschmann v. McHenry*, 29 Wis., 655, distinguished. *Ibid.*
3. *It seems* that one who had no possession, real or constructive, of the house while *in transitu*, but merely permitted it to be attached to his soil by the person who removed it, could not be held guilty of a conversion of the house. *Ibid.*
4. If one who is rightfully in possession of land under a contract of sale, after default in payment but before any foreclosure of his equity, dispose of a house, attached to such land (as by removing it to other land), the vendor in the land contract, having no possessory title to the house, cannot maintain replevin or trover therefor. *Ibid.*
5. If the purchaser in a land contract, before payment of the price, has no right as against the vendor to remove a building thereon, and so diminish the value of the security (as intimated in *Seatoft v. Anderson*, 28 Wis., 212), still the vendor's remedy in such a case is not by action for damages, but by proceeding to stay waste. *Fairbank v. Cudworth*, 33 Wis., 358. *Ibid.*

CORAM NON JUDICE.

See CONSTITUTIONAL LAW, 9-13.

CORPORATIONS.

(A.) *Private.*

See INSURANCE (B.), 10.

- Ch. 258, P. & L. Laws of 1866, in terms constitutes the persons therein named a corporation; and, although the first meeting of the stockholders for the election of officers, etc., and all subsequent meetings, were held outside of this state, their acts constitute an acceptance of the charter; and the company is estopped from denying the validity of contracts entered into by its officers *de facto* on the ground that it could not legally elect such officers and transact business except within the limits of this state. *Heath v. Silverthorn L. M. & S. Co.*, 146

(B.) *Municipal.*

1. The common council of a city having ordained a change of the grade of numerous streets, in a part of the city in which plaintiff's lots were situate, and having executed the ordinance in part, plaintiff, who was suffering serious special injury from such *partial* execution, in order to relieve himself from such injury, signed a petition to the common council to have the street fronting his lots completed according to such grade. *Held*, that this was *not* a waiver of his right to damages for such change of grade. *Herzer v. City of Milwaukee*, 360
2. In passing judicially upon official records, where authority appears or is implied by law, they will be construed according to their intent, and it will be assumed that the proceedings were rightly had, in the absence of all suggestion in the record to the contrary. *State ex rel. Posey v. Sup'rs Crawford Co.*, 596
3. Where a board of supervisors resolved that an order be entered on its journal purporting that the board ordered and determined "as follows:" *Held*, that the board, *ipso facto*, ordered and determined what followed. *Ibid.*
4. The record of the proceedings of such a board contains this entry, as of a specified date: "Board met pursuant to adjournment. Roll called by clerk. Members all present;" and then states that a certain resolution was offered by a person named, and was passed, "all members voting in the affirmative but one." *Held*, that this record imports that the vote was by a full board, all the members except one voting for the resolution; and the court cannot intend facts inconsistent with it for the purpose of making it bad. *Ibid.*

COSTS.

See APPEAL (C.), 14-17. DIVORCE, 8, 22.

1. The guardian of the infant issue of a wife to whom a bequest was made by the terms of the husband's will, but who died before the husband (so that the bequest lapsed), having appealed to this court, from a judgment of the circuit court (on appeal from an order of distribution made

- by the probate court) denying their right to such bequest, the costs of the appeal on both sides are ordered to be paid from the estate. *Cleaver et al. v. Cleaver et al.*, 96
2. On appeal by the mortgagor from a judgment which provides for a sale of the homestead first, this court has no discretion, on reversing such judgment, to award costs against the subsequent mortgagee defendant, instead of against the plaintiff, although such provision was inserted in the judgment against the will of the latter, and on motion of such subsequent mortgagee. *Smith v. Wait, imp.*, 512
 3. Under ch. 60 of 1862 (which gives discretion to the circuit courts to allow costs upon verified complaints in cases within the jurisdiction of a justice, when the sum demanded shall exceed \$100), the verification of the original complaint claiming over \$100 is sufficient for the discretion of the circuit court to rest upon, though the complaint be afterwards amended in some particulars, not changing the cause of action nor reducing the amount claimed below \$100. *Power v. Rockwell*, 585

COUNTERCLAIM.

See CONTRACTS, 12 (4), (5). EJECTMENT, 3. PLEADING, 1. VARIANCE, 1.

1. Hereafter no averment in an answer will be held by this court to constitute a *counterclaim*, unless it be so denominated, and the proper relief prayed. *Stowell et al. v. Eldred*, 614
2. The judgment in suit was for rent alleged to have accrued under a written lease between July 1, 1861, and April 1, 1863. The lease had in fact been surrendered to plaintiffs, and accepted by them, through their duly authorized agent, in January, 1862, and the premises relet by them to other tenants. Defendant set up these facts in plaintiffs' former action, as a partial defense thereto; and, having failed, after due diligence, to obtain the testimony of said agent, called as a witness one of the plaintiffs, who was the only one of them residing in Illinois, and personally knew said facts (as did all the plaintiffs); but the witness denied the facts, and in consequence of such denial, the judgment in plaintiffs' favor was for \$6,500 more than it would have been if said plaintiff had testified to the truth. *Held*, that in this action upon such judgment, defendant may maintain an *equitable counterclaim* for said sum of \$6,500. 28 Wis., 604. *Ibid.*
3. Although in a prosecution against said witness for perjury, he might allege forgetfulness of the facts at the time, to disprove a criminal intent, yet plaintiffs cannot be heard in this action to allege such forgetfulness by one of their number to enable them to recover from defendant a large sum of money which in justice and equity they ought not to recover. *Ibid.*

COUNTY BOARD OF SUPERVISORS.

See CONSTITUTIONAL LAW, 14. CORPORATIONS (B.), 2-4. LIMITATION OF ACTIONS, 3.

COURT AND JURY.

See ADVERSE POSSESSION, 15. COMMON CARRIER, 3. INFANCY, 5. JUDGMENT (F.), 1, 3. NEGLIGENCE, 3.

1. Plaintiff's minor child having been bitten by defendant's dog, there was evidence, in an action for the injury, tending to show that defendant had owned the dog for two years before that time; that it was kept tied some portions of the time; that defendant sometimes took it on the street tied with a rope, thus keeping it under his control; that before biting plaintiff's child, it had bitten several persons, mainly children, at different times, and had at divers other times violently attacked many other persons; that it frequently attacked persons walking along the street in the vicinity of the defendant's residence; and that it was a cross dog, and was known and shunned as such by defendant's neighbors. *Held*, that the question of defendant's *knowledge* of the dog's vicious propensities was properly submitted to the jury on this evidence. *Keenan v. Hayden*, 553
2. In such a case, where there are several facts in evidence tending to prove the *scienter*, it is not the duty of the court to instruct the jury what the consequences would have been if *only one* of those facts had been in evidence; and there was no error in this case in refusing to charge that the mere fact of defendant's confining his dog at times would not of itself warrant the jury in finding that it was known by defendant to be vicious. *Ibid*.

CRIMINAL LAW AND PRACTICE.

1. An appeal does not lie to this court from an order or judgment in a *criminal* action or proceeding. *In re Murphey*, 236
2. A person convicted of and fined for a criminal contempt, by the circuit court, cannot bring the order or judgment of conviction to this court by *appeal*; and the fact that the contempt consisted in disobedience to an order made in a civil action, does not affect the rule. *Ballston Spa Bank v. Marine Bank*, 18 Wis., 490; *Witter v. Lyon*, 34 id., 560; *Lamonte v. Pierce*, id., 483; and *In re Day*, id., 638, distinguished from this case; and *Haight v. Lucia*, 36 Wis., 355, criticised. *Ibid*.

DAMAGES.

(A.) *In Actions for Personal Injuries.*

1. The circuit courts of this state have the power, and it is their duty, to set aside verdicts awarding excessive damages. *Bass v. C. & N. W. Railway Co.*, 636
2. Verdicts are not to be set aside as excessive merely because the court would be better satisfied if the damages were assessed at a less sum, but only when it is clear that they are materially greater than the evidence will justify. *Ibid*.

3. In this case the jury might have found from the evidence that the plaintiff, as a passenger on defendant's train, being unable to find a seat elsewhere, except in a filthy smoking car, peaceably and lawfully, and without being forbidden, entered the ladies' car, in which there were many vacant seats, and, when about to occupy one of these, without having been first requested to leave the car, was rudely and violently seized by the defendant's brakeman, and forcibly thrust from the car to the platform; that the train was then crossing a river, though, from the construction of the platform, the peril to plaintiff from that circumstance was slight; that the assault was committed in the presence of a number of ladies and gentlemen; that plaintiff's cane, and a ring on one of his fingers, were broken, and the broken ring cut the finger to the bone, making a ragged wound; that the back of one of his hands was lacerated or bruised so that blood flowed from the wound; and that one arm was somewhat bruised, and showed extravasation for three weeks thereafter. Under instructions which did not allow *exemplary damages*, plaintiff had a verdict and judgment for \$4,500. *Held*, excessive. *Ibid*.
 4. The fact that on a former trial of the cause the jury awarded the same amount of damages, has no force to sustain the present verdict, it appearing that the jury were permitted by the court on such former trial to award *exemplary damages*. *Ibid*.
 5. There was evidence on the present trial tending to show that after defendant had notice that its brakeman had committed the injuries complained of, it retained him in its service, and promoted him to a position of greater responsibility. *Held*, that if this was done with knowledge of the manner and circumstances of the assault alleged in the complaint, it might be such a ratification of the brakeman's acts as to authorize the jury, in its discretion, to award *exemplary damages*; and they should have been so instructed. *Ibid*.
 6. But, no such instruction having been given, the verdict must be treated as one for compensatory damages only, and must be set aside as excessive. *Ibid*.
- (B.) *In Replevin for Logs.*
See REPLEVIN, 2.
- (C.) *For Breach of Warranty.*
See WARRANTY.

DEED.

1. J. G. A., after the death of his wife, Rosina A., being in possession of land which had belonged to her, and entitled to the possession as tenant by the curtesy and as owner in fee of an undivided one-sixth thereof as heir-at-law of a deceased son, Henry A., conveyed the land by warranty deed to Z.; in the premises of which deed the grantor is described as "father of Henry A., deceased, and husband of Rosina A., deceased, and only heir-at-law of both." Then follow apt words to convey the whole land. *Held*, that the deed purports to convey the whole land, and not merely the interest which the grantor really had therein; and possession of the land under such deed by the grantee and those claiming under him was a possession under color of title adverse to the surviving children and heirs of Rosina A., and would ripen into a perfect title in ten years, under

- the statute of limitations. R. S., ch. 138, secs. 6, 7, 10. *Wiesner v. Zaun*, 188
2. The grantor in such deed having subsequently become entitled to another undivided sixth part of said land as heir-at-law to another child, deceased, said title, by virtue of the covenants in the deed, enured to the benefit of the grantee therein named, by way of estoppel. *Ibid.*
 3. The omission of the grantee's name immediately after the operative words of grant in a deed, is cured by the *habendum* to him (by his name), his heirs and assigns. *Laure v. Hyde*, 188
 4. Though conditions regularly follow the *habendum*, they are good in any other place. *Ibid.*
 5. A deed, after the words of grant and a description of the premises by metes and bounds, contained words expressive of a condition subsequent, followed by the words "together with all and singular the hereditaments and appurtenances," etc., and these followed by the *habendum*. *Held*, that it was a good conveyance in fee on condition subsequent. *Ibid.*
 6. At the date of said conveyance, the Lawrence Institute (since Lawrence University) was incorporated to be "*located*" within certain limits, which included the land conveyed, at such place as the trustees of the corporation should select, and to be "*erected* on a plan sufficiently extensive," etc. Plaintiff deeded thirty-one acres in section 26, town 21 north, range 17 east, to one L., his heirs and assigns forever, "for the consideration of one dollar, for the benefit of the Lawrence Institute," with the condition, that said Institute "*shall be maintained* on section 26, as above described, and, in case of failure or removal, the said land shall revert back" to the grantor, or to his heirs or assigns. *Held*:
 - (1) That this condition, as one to defeat the estate, is to be construed strictly, and is satisfied by the selection and continued use of *any part of said section 26*, as the *site of the structures* of the university, and does not require them to be located and maintained on the land conveyed.
 - (2) That the fact of the conveyance being made, in terms, "for the benefit" of said university, does not imply that the land conveyed is to be occupied by it; but merely that such land is to be used for the *advantage* of the institution, by occupying, renting, *selling* or otherwise.
 - (3) That a sale and conveyance of a portion of the land by the university does not work a forfeiture of the title. *Ibid.*
 7. It appearing that the university is maintained on a part of the land so conveyed by plaintiff, *quere* whether the sale by it of the other part would be a breach, and work a forfeiture, even if the condition were that such university should be maintained on the land conveyed. *Ibid.*

DEMURRER.

See PLEADING, 1.

DESCENTS, STATUTE OF.

1. Rosina A., a married woman, died intestate, seized of land; while her husband held the land as tenant by the curtesy, two of their six children died; and after the husband's death, a third child of him and the said Rosina A. died, a minor and unmarried. *Held*, that the undivided one-sixth interest in the land, which said child inherited from the mother, descended to the three surviving children in equal shares (R. S., ch. 92, sec. 7;

Tay. Stats., 1170, § 1, subd. 6); and said surviving children took as heirs of the mother, and not as heirs of the deceased child. *Perkins v. Simonds*, 28 Wis., 90, as to this point, reaffirmed and held applicable to the revision of 1858. *Wiesner v. Zaun*, 188

2. The undivided one-eighteenth which thus descended to plaintiff as one of the three surviving heirs of Rosina A., is held by plaintiff in the same manner, and subject to the same rules of law, as the one-sixth interest which accrued to her immediately upon the mother's death; and it may be recovered in this action if said one-sixth may be thus recovered, and not otherwise. *Ibid.*
3. The rule that, upon the death of a minor child, the interest in land which he inherited from his mother descends to the surviving children as heirs of the mother, and not as heirs of such deceased minor, is not intended to affirm that such surviving children will take the title unaffected by any conditions, as though such minor had never existed. *Ibid.*
4. If the estate of such deceased minor had been sold under the statute for his maintenance or education, the purchaser might have acquired a perfect title, which would not be divested on the minor's death. *Ibid.*

DISABILITY.

See ADMINISTRATORS, etc. DIVORCE, 12. LIMITATION OF ACTIONS, 1, 2.

DISSOLUTION OF PARTNERSHIP.

See PARTNERSHIP

DIVORCE.

See APPEAL (C.), 4. CHANGE OF VENUE, 1, 2.

1. A collusive agreement between husband and wife to procure a divorce when no breach of matrimonial duty had been committed, would be a fraud upon the court. *Hopkins v. Hopkins*, 167
2. Whether an agreement by the husband not to oppose the granting of the divorce to the wife, and to pay a stipulated sum for alimony, would be a fraud upon the law, and a sufficient ground for setting aside the divorce, is not here decided. *Ibid.*
3. One who seeks to have a judgment of divorce set aside upon the ground of fraud or collusion in procuring it, has the burden of proof; and in this case the proof is insufficient. *Ibid.*
4. Courts of law or equity in this country, in matters of divorce, have only the power conferred on them by statute. *Ibid.*
5. In actions for divorce, courts of this state have no authority to take the custody and control of the child from both parents, and give it to a stranger. *Ibid.*
6. It appearing that defendant's property is worth only \$7,575, and that his income is small and uncertain, this court regards an award of \$3,000 alimony to the plaintiff as excessive, although defendant once offered to pay

that amount; and it directs the judgment to be modified so as to award only \$2,000. *Ibid.*

7. Where an answer was served after the motion for temporary alimony, etc., was made, and before it was determined, but was not filed until after its determination, and was not before the court on the hearing of the motion, this court must affirm the order granting such alimony, if justified by the facts stated in the petition. *Moe v. Moe*, 308
8. But the proper circuit court can modify said order on defendant's application, and may in its discretion allow, on the attorney's fees therein directed to be paid, any attorney's fees which shall be paid by the defendant on these appeals. *Ibid.*
9. Sec. 12, ch. 111, R. S., rests jurisdiction of actions for divorce in this state upon the residence of the plaintiff alone, and requires the plaintiff to have resided here one year immediately preceding the suit, except when the suit is for adultery committed while the plaintiff is a resident here, and when the marriage is solemnized here and plaintiff continues to reside here until suit brought. *Dutcher v. Dutcher*, 651
10. The legislature, in enacting this statute, was legislating for the citizens of this state, and not for others; and the residence required by it must in each case be actual and *bona fide, animo manendi*; such a residence as, continuing for a year, would make a man a qualified elector of the state. *Ibid.*
11. The rule that the domicile of the wife follows that of the husband, is inapplicable, at least under our statute, to a case of divorce, where the parties are actually living in different jurisdictions; and the fact that the husband's domicile has been in this state for many years will not enable the wife to sue for a divorce here, if she has continued to live in another state. *Ibid.*
12. In such an action the plaintiff's want of residence under the statute is a *personal disability*, which may be cured, and is matter in *abatement* and not in bar of the action. *Ibid.*
13. Under the code, matter of abatement and matter of bar may be set up as separate defenses in the same answer; but neither the distinction between the two kinds of defense, nor the legal effect of judgments upon them respectively, is affected by the code. *Ibid.*
14. If matter of abatement, not apparent in the complaint, is relied on as a defense, it must be *specially pleaded* in the answer (R. S., ch. 125, secs. 5, 8), and a mere general denial is not sufficient. *Ibid.*
15. Even if a defense in divorce on the ground of plaintiff's nonresidence were in the nature of a plea to the jurisdiction, it would have to be pleaded *specially*. *Ibid.*
16. Subd. 3, sec. 13, ch. 111, R. S. (which provides that in any action brought for divorce on the ground of adultery, although the fact of adultery be established, the court may deny a divorce "when there shall have been no express forgiveness and voluntary cohabitation of the parties, but the action shall not have been brought *within three years* after the discovery by the plaintiff of the offense charged"), was copied in 1849 from the revised statutes of New York of 1829 (except that *three years* are substituted for *five*); and was taken here with the settled construction

- previously given it by the courts of New York. And where the plaintiff knew that the defendant was living in open and continuous adultery with another person more than three years before action brought, the right to maintain such action is barred, although such adulterous intercourse is continued down to the commencement of the action; such having been the settled construction of the statute in New York, before its adoption here. *Ibid.*
17. Where, however, the existence of such statutory bar does not appear from the complaint, it must be pleaded by the defendant in his answer, as new matter, and he cannot avail himself of it under a general denial. *Ibid.*
 18. As a rule, a general denial under the code is a mere traverse, in bar, of the facts pleaded in the complaint, and does not admit special defenses in abatement or in bar. *Ibid.*
 19. In suits for divorce (especially under the statute of this state, which gives divorce as a right only so far as the right is to be implied from the grant of jurisdiction to the courts, which is in terms permissive only), the court will exercise a judicial discretion in accordance with the policy of the statute, and will withhold judgment of divorce in cases not within the statute upon their merits. *Ibid.*
 20. Hence, it appearing conclusively in this case that the plaintiff had not such a residence here as the statute requires, and it also appearing, but not so conclusively, that she had notice of the defendant's adulterous cohabitation with another person more than three years before suit brought (although neither fact is pleaded specially as a defense in the answer, so that, in a mere question of private right between the parties, defendant could not take advantage of either), the judgment in plaintiff's favor is reversed, with directions to the court below to permit the answer to be amended, or to consider it as amended on the trial, so as to raise the defense in abatement, and to dismiss the complaint on the sole ground of plaintiff's nonresidence at the commencement of the suit. *Ibid.*
 21. *As between the parties*, the rules of pleading and practice will be enforced in divorce suits as in other cases; and they will be relaxed in such suits only when the public interest is involved. *Ibid.*
 22. The costs in this court and the court below are required to be paid by the defendant, who is the appellant. *Ibid.*

DOMICILE.

See DIVORCE, 9-12.

EJECTMENT.

See BETTERMENT ACT.

1. The statute (ch. 141, sec. 4, R. S.), though it does not require the complaint in ejectment to set out the plaintiff's title, does not prohibit special complaints in that form; and it seems a proper form where the rights of the parties depend wholly upon questions of construction for the court. *Law v. Hyde*, 345
2. A stipulation of the parties having been filed in this court, that this action should stand as one of ejectment by the plaintiff therein against the de-

defendant, this court holds the stipulation as supplying any missing formal averments required by the statute in complaints of that character, and treats the complaint as a special complaint in ejectment setting out the plaintiff's title. *Ibid.*

8. Defendant in ejectment cannot, generally, set up a counterclaim resting on his *legal* title, for a release to him of plaintiff's claim of title, which the answer alleges to be void on its face, and without color of right. *Jarvis v. Peck*, 19 Wis., 74, distinguished. *Ibid.*

EQUITY.

See CONTRACTS, 12 (2)-(5). COUNTERCLAIM, 2, 3. FORECLOSURE OF MORTGAGE. LIS PENDENS. PARTNERSHIP. SPECIFIC PERFORMANCE. SUBROGATION.

1. Proceeding in equity to enforce a forfeiture cannot be sustained. *Lowe v. Hyde*, 345
2. The vendor of land by an ordinary land contract holds the legal title as security for the unpaid purchase money; and on default in its payment is entitled, in this state, to a *strict foreclosure* of the purchaser's equity of redemption. *Church v. Smith, imp.*, 492
3. If the vendor transfers to another person the purchaser's notes for the whole of the unpaid purchase money, he will hold the legal title in trust for the security of his assignee; and on failure of the purchaser to pay such notes at maturity, the assignee will be entitled not only to a strict foreclosure of the purchaser's equity of redemption, but to a judgment against the vendor enforcing the execution of such trust in some appropriate manner. *Ibid.*
4. Whether a mere *vendor's lien* will pass to and be enforceable by an assignee of the purchase-money debt, is not here considered. *Ibid.*
5. Where the vendor transfers only *a part* of the purchase-money notes, he will hold the legal title as trustee for his assignee *pro tanto*; and, after a strict foreclosure in his own behalf upon default in payment of the notes by him retained, he will hold the absolute title to an undivided portion of the land as trustee for his assignee, the amount of the assignee's interest in the land being proportioned to his interest in the unpaid purchase money. *Ibid.*
6. In an action by the holder of a part of the purchase-money notes in such a case, it is error to adjudge the plaintiff's rights in the land *paramount* to those of the vendor, or to direct a sale of the land and a personal judgment against the vendor for a deficiency: but he should be adjudged to convey to the plaintiff the proper undivided part of the land, or, if he cannot do that, to make compensation therefor on equitable terms; and this relief should be granted where the necessary facts are alleged in the complaint, though the specific relief there demanded is a foreclosure and sale. *Ibid.*
7. Equity will relieve against an inequitable judgment at law, where the judgment defendant was ignorant, pending the legal action, of the facts showing such judgment to be contrary to equity; or they could not have been set up as a defense; or he was prevented from availing himself of

them, by fraud, accident, or the acts of the adverse party, without negligence or fault on his own part. *Barber v. Rukeyser*, 590

8. The attorney of the defendant in a legal action had notice that the action was called for trial, and was requested by an officer of the court to attend at once and look after it, and neglected to appear and set up the defense now alleged. Notice of the taxation of costs and of the entry of judgment was served on said attorney, who failed to appear at the taxation or object to the entry of judgment; and no motion was made to vacate the judgment while it was under the control of the court. During the whole time, the facts now relied upon as showing a defense (if they existed) were well known to said defendant. *Held*, that by reason of his *laches*, equity will not interfere to relieve him from the judgment. *Ibid.*

ERROR.

See JUDGMENT (F).

ESTATES OF DECEDENTS.

See ADMINISTRATORS, etc. COSTS, 1.

ESTOPPEL.

See BILLS AND NOTES, 6. CORPORATIONS (A.), 1. DEED, 2. FORECLOSURE OF MORTGAGE, 3. INSURANCE (B.), 12. LIEN (B.), II, 2. OFFICER.

EVIDENCE.

See ADVERSE POSSESSION, 12-14. CONTRACTS, 8 (1), (3), 11, 12 (5). COURT AND JURY, 1, 2. DIVORCE, 3. INFANCY. INSURANCE (A.), 3, 4. INSURANCE (B.), 3. REFPLEVIN, 3.

1. Evidence is inadmissible which does not tend to prove *the cause of action alleged*. *Johnson v. Filkington*, 62

2. Upon a settlement between the parties, in 1849, plaintiff gave defendant his promissory note, in the usual form, for \$682.07, and took defendant's receipt, as follows: "Received of *Peter Yates*, on settlement, one dollar in full of all demands except a note of even date of \$682.07 and the rat trap." Plaintiff claims that the note represents advances made by defendant on account of a certain engine, here called the "rat trap;" that the agreement was, that payment should be made only out of the profits thereof; and that there were no profits. Defendant claims that the note was given unconditionally for the balance due him on the settlement. *Held*,

(1) That the note is in terms an unconditional promise to pay; and the legal effect of the receipt is the same as though it had specified that the note was given defendant in full settlement of all the business transactions of the parties, except those growing out of the engine adventure.

(2) That the other evidence being balanced (consisting solely of the conflicting testimony of the parties), and the burden of proof being upon the plaintiff, he must be held liable for the amount due on the note by its terms. *Yates v. Shepardson*, 173

3. A check drawn by one party in favor of the other, and paid to him, is of itself no sufficient evidence that the sum therein named was a loan from the drawer to the payee. *Ibid.*
4. An allotment of land in the Brothertown Reservation under the act of congress of March 3, 1839, vested in the allottee an equitable title, though the naked legal title probably remained in the United States. *Hammer v. Hammer*, 182
5. In ejectment by the widow of the allottee (to whom his estate descended under the statute, upon his death without issue), it was error to reject evidence of such allotment accompanied by evidence that the allottee entered into possession under it, claiming the land as his own, and continued so to occupy it for more than twenty years; such evidence tending to show a valid title in him at his death. *Ibid.*
6. Where the purchaser of machinery made to order, seeks, in an action for the contract price, to recoup damages for breach of warranty, the plaintiff may introduce proof of the actual value of the machinery, independently of the contract. *Merrill et al. v. Nightingale et al.*, 247
7. The order of proof is very much under the control of the trial court; and where the plaintiffs' proof of the actual value of the machinery, in such a case, was received before defendants had given evidence of their damages: *Held*, that the judgment will not be reversed for that reason, it not appearing that defendants could be injured by the practice adopted. *Ibid.*
8. The machinery in question being designed for the manufacture of a certain kind of paper, and defendants having testified that, upon their testing it, such paper could not be manufactured with it, plaintiffs were entitled to show, in rebuttal, that the tests made were not fair or conclusive, because of the unfitness of the water used, or for any other reason. *Ibid.*
9. The rule in respect to the relative value of positive and negative testimony is inapplicable to the case where one party to a verbal lease testifies that it did, and the other that it did not, contain a certain grant. *Sobey et al. v. Thomas et al.*, 317
10. In an action by a married woman, her husband may testify in her behalf as to acts done by him as her agent, whether done in her presence or in her absence. *Menk v. Steinfert*, 370.
11. On taking a conveyance of certain property from defendant's intestate, plaintiff caused to be assigned to him a certain mortgage belonging to her husband, executed by one L. Afterwards plaintiff reconveyed to the intestate his said property, and, about a year thereafter, L. paid his mortgage debt to plaintiff's husband, and received from him a satisfaction of the mortgage theretofore executed by the intestate. In the transactions concerning those conveyances, plaintiff's husband acted generally as her agent. *Held*, that in this action he could not testify that he did not act as her agent in receiving the payment of L.'s mortgage. *Ibid.*
12. Where title to logs was claimed by the parties under A. and G., respectively, it seems that parol evidence was admissible to show that a conveyance from one K. to A. of the standing timber from which the logs were cut by G., was taken by A. for G., and as security for A.'s advances to G. *Andrews, Ex'trix, v. Jenkins et al.*, 476

13. In an action for an alleged balance due plaintiff for erecting for defendant certain houses of uniform size and plan, where the only question was, whether, by the contract between the parties, the roofs were to have a one-fourth or a one-third pitch, plaintiff put in evidence the written specifications for the houses, which did not specify the pitch of the roofs, but referred to a plan, distinct from the specifications. *Held*,
 (1) That testimony was admissible for the plaintiff to show that such plan corresponded with a certain drawing which had been lost, and also to show at what pitch the roofs were represented on such drawing.
 (2) That defendant was then entitled to show by parol that the plan agreed upon corresponded with that of certain other houses, and what was the pitch of their roofs. *Marsh v. Pugh*, 507
14. When an indorsee of commercial paper, in an action by him thereon, has shown that he took it in the usual course of business (as by showing that he was a banker at the place where the payee resided, and purchased the paper at its face, on the day after its date), the burden is then upon the defendant to show, not only that the paper was obtained by the payee's fraud, but that the circumstances were such as to charge the plaintiff with notice of the fraud, or at least put him upon inquiry. *Reeve et al. v. L. L. & G. Ins. Co. et al.*, 520
15. Where the question was, what was the market price of hogs on the 31st of December, at Prairie du Chien in this state, plaintiff's proof of such market price not being certain or satisfactory, it was error to reject defendant's offer to show the market price in McGregor, Iowa, on the same day. *Siegbert et al. v. Stiles*, 533
16. The court will take notice that Prairie du Chien and McGregor are separated only by the Mississippi river; that during the winter when the river is frozen, each of these towns may be easily and speedily reached from the other; and that, consequently, there could not be any considerable difference in the market value of hogs at the two places. *Ibid.*

EXCEPTIONS.

1. On a single exception to a refusal to give two instructions asked by the appellant, this court can only consider whether both instructions, taken together, are a correct statement of the law. *Harrison, Judd & Co. v. Crocker*, 68
2. Where a case has been referred for trial, the report of the referee is final as to any finding of fact not duly excepted to. *Yates v. Shepardson*, 173
3. The referee having rejected certain items, and defendant having excepted merely to his failure to allow \$150 therefor, the court erred in allowing more than that sum. *Ibid.*
4. The bill of exceptions bears date March 9, 1875, and the exceptions to the judge's charge, incorporated therein, appear not to have been filed until March 22d, after a motion on the judge's minutes for a new trial had been denied, but before the close of the term. The record states that when the motion for a new trial was argued, the reporter's minutes of the charge had not been written out, and no copy was in the possession of appellant's attorney. *Held*, that the exceptions were in time to enable this court to review them under sec. 2, ch. 194, Laws of 1874. *Merriam v. Field*, 573

EXCESSIVE DAMAGES,
See DAMAGES (A.).

EXEMPLARY DAMAGES,
See DAMAGES (A.), 5.

EXECUTION,
1. *Against Property.*
See EXEMPTION.
2. *Against the Person.*
See ARREST, 3.

EXECUTORS.
See ADMINISTRATORS, etc.

EXEMPTION.

1. Where an execution for a partnership debt is levied upon goods of the firm, the partners may sever their interest, and each may then claim his exemption in his separate part. *Newton v. Howe*, 29 Wis., 531. *Russell et al. v. Lennon*, 570
2. But under the constitution and laws of this state, exemption of property from execution is a *personal privilege of the individual debtor*, and there is no exemption in favor of partners jointly. *Gilman v. Williams*, 7 Wis., 529, as to this point, overruled. *Ibid.*
3. In case, therefore, of a levy upon goods of a firm for a partnership debt, the partners cannot maintain a joint action to recover the property as exempt. *Ibid.*

FINDINGS.
See APPEAL (C.), 2.

FIRE INSURANCE.
See INSURANCE (B.).

FORECLOSURE OF LAND CONTRACT.
See EQUITY, 2-6. JUDGMENT (E.), I.

FORECLOSURE OF MORTGAGE.

See COSTS, 2.

1. One H., made defendant with the corporation mortgagor, alleges that a mortgage of the same premises, executed to him by the officers of the company, was prior to that of plaintiff, and exhausted the power of said officers in that behalf; and asks that the plaintiff's mortgage be adjudged void, and his own the sole valid lien on the premises. The corporation does not

contest the validity of the H. mortgage, nor ask any relief against it. Plaintiff's mortgage having been adjudged prior and paramount to that of H., and a judgment of foreclosure and sale having been rendered in his favor, it was error to further adjudge the H. mortgage void for all purposes; and for such error the judgment is reversed, and the cause remanded with directions to enter a proper judgment. *Heath v. Silverthorn L. M. & S. Co.*, 146

2. The defendant in a mortgage foreclosure, claiming that a trust deed of the premises executed to a third person is prior to the mortgage in suit, has a right to have that question determined in the action, and for that purpose to have the grantee in such deed made a defendant. *Baass v. C. & N. W. R'y Company*, 296
3. There was no error, therefore, in refusing to vacate an order that such grantee be made a defendant, although plaintiff offered to stipulate "for the purposes of this case," that the lien of said deed was prior to that of his mortgage; such stipulation not being conclusive of the question as against other parties, nor, perhaps, as against the plaintiff himself in any other action or proceeding. *Ibid.*
4. Since ch. 133 of 1870, on foreclosure of a mortgage covering the mortgagor's homestead, a subsequent mortgagee of the same lands without the homestead, cannot insist that such homestead be first sold to pay the mortgage in suit, although his lien was acquired prior to the passage of said act. *Smith v. Wait, imp.*, 512

FORFEITURE.

See CONTRACTS, 12 (1), (3). DEED, 6, 7. EQUITY, 1, 2. INSURANCE (B.), 7-11. INSURANCE (C.)

FRANCHISES.

1. The right to collect tolls upon logs put into a river, granted by a statute, is a franchise, and like other property must have a certain owner. *Sellers v. Union Lumbering Co.*, 525
2. Ch. 12 of 1873, by its terms, authorizes any person, company, corporation, their successors or assigns, who shall, at a prescribed expense, have improved a certain river by prescribed works, and shall keep the same in repair, so as to facilitate the floating of logs, to collect certain tolls upon logs put into the river. *Held*, that the statute purports to grant the franchise, not to one person, or company of persons, or corporation, but to every person improving the river according to the terms of the statute, whether before or after its passage; and it is void for want of a *certain grantee*. *Ibid.*

FRAUD.

See AGENCY. BANKRUPTCY, 2. BILLS AND NOTES, 3, 4. DIVORCE, 1-3.

FRAUDS, STATUTE OF.

See SALES (A.), 5.

GEOLOGICAL SURVEY.

See CONSTITUTIONAL LAW, 5.

HIGHWAYS.

1. The doctrine of *Whisler v. Wilkinson*, 22 Wis., 572, that the rivers of this state of sufficient capacity to float logs to mill or market are public highways, followed. *Sellers v. Union Lumbering Co.*, 525
2. A town is liable for defects anywhere in the worked and traveled part of a highway, although the same may be wide enough for three or teams abreast, *Matthews et ux. v. Town of Baraboo*, 674

HOLIDAYS.

See CONTRACTS, 2, 3.

HUSBAND AND WIFE.

See EVIDENCE, 10, 11. PLEADING, 2-4.

INFANCY.

See DESCENTS, STATUTE OF, 3, 4. DIVORCE, 5. LIMITATION OF ACTIONS, 4.

1. The mere fact of receiving into one's family indefinitely an infant not of kin thereto, does not imply a contract to pay wages, though such a contract may sometimes be implied from the surrounding circumstances. *Tyler v. Burrington, Adm'x*, 876
2. If it appears expressly, or from the surrounding circumstances, that the infant was so received *in the relation of a child*, the law excludes an implied contract to pay wages for his services; but an *express* contract to pay such wages may be established by direct and positive evidence, or by circumstantial evidence equivalent to direct and positive. *Pellage v. Pellage*, 32 Wis., 136. *Ibid.*
3. One who, having been received in infancy into a family not of kin to her, seeks to recover for services rendered to such family, has the *burden of proof* to show either an express contract or surrounding circumstances from which a contract can be implied; and if it appears that she was received *as a child*, she must prove an express contract for wages. *Ibid.*
4. In such a case the mere expectation on the one part to pay, and on the other part to receive wages, never expressed by the parties to each other, does not constitute an express contract, though, if established by competent evidence, such expectations of the parties may sometimes give color to circumstances tending to show that they entered into an express contract. *Mountain v. Fisher*, 22 Wis., 93, explained. *Ibid.*
5. In such cases, juries should receive precise instructions on the distinction between circumstances from which a contract may be implied, and circumstantial evidence of an express contract; and verdicts proceeding on a confusion of these two things should be set aside. *Ibid.*

INJUNCTION.

1. An injury is *irreparable*, and will be enjoined, if of such a nature that it cannot be adequately compensated in damages, or cannot be measured by any certain pecuniary standard. *Wilson v. City of Mineral Point et al.*, 166
2. The complaint alleges that plaintiff owns certain lots in the defendant city, upon which his dwelling house is situate, which are enclosed with fences, and entirely surrounded by what purport to be public streets, and have growing upon them many fruit and ornamental trees and much shrubbery, of several years' growth and of great value, greatly enhancing the value of the lots; and that such lots have been so enclosed for twenty-five years; and it alleges facts showing that, unless enjoined, the street commissioner of said city (who is also made a defendant) will, by order of the common council, destroy said fences, on the ground that they encroach upon the public streets, and will dig up and destroy many of said fruit and ornamental trees, and expose the remainder to be destroyed for want of fences, which, it is alleged, will be to plaintiff's "great and irreparable damage." It is further alleged, that said fences do not encroach upon the public streets, and that the defendants have no right to do the acts threatened. Prayer, for an injunction and for damages. *Held*, on demurrer.
 - (1) That the complaint states a good ground for an injunction against both defendants.
 - (2) That there is no misjoinder of causes of action, nor defect of parties. *Ibid.*
3. Whether the complaint states a cause of action for damages, is not decided. *Ibid.*

INSTRUCTIONS TO JURY.

See COURT AND JURY, 2. INFANCY, 5. JUDGMENT (F.), 2, 6, 7, 9, 10. SALES (A.), 6, 7.

There being conflicting evidence as to whether defendant used ordinary care and skill in testing a reaper, sold to him by plaintiff, and alleged by him to be worthless, the jury were instructed that "the presumption is that the machine was operated with ordinary care and skill, and, unless the contrary be shown, the jury must assume such to be the fact;" and that, "in the absence of testimony to the contrary, the presumption would be that ordinary care and skill were used" in this case. *Held*, that in the actual state of the proofs, the question what presumption would arise in the absence of all evidence, was not involved in the cause; the question of fact should have been submitted to the jury upon the evidence; and the instructions were erroneous, because calculated to mislead the jury to plaintiff's prejudice. *Harrison, Judd & Co. v. Crocker*, 68

INSURANCE.

(A.) *Marine Insurance.*

1. The words, "Loading offshore prohibited," in a policy of marine insurance, are capable of being construed by the court without the aid of extrinsic evidence; and where the plaintiff puts such a policy in evidence in an action thereon, without extrinsic evidence of its meaning, there is no error in denying a nonsuit on that ground. *Johnson v. N. W. Nat. Ins. Co.*, 87
2. In the absence of extrinsic evidence, this court would construe such words as merely intended to prohibit loading while the vessel was lying at anchor away from the shore, and not to prohibit loading at a bridge pier. *Ibid.*
3. In an action on such a policy, parol evidence of experts is admissible to show that the words "loading offshore" have acquired a certain definite and notorious meaning among nautical men, and that they include loading at a bridge pier. *Ibid.*
4. If adopted by the underwriter in a nautical sense, such words will be presumed to have been taken with their known signification in maritime matters, and the testimony as to their meaning cannot be confined to their use in policies of insurance. *Ibid.*
5. To instruct the jury that if the term "offshore" may be understood in more senses than one, it is to be interpreted "in the sense in which defendant had reason to suppose plaintiff understood it," would be error. *Ibid.*

(B.) *Insurance against Fire.*

1. In an action on a fire insurance policy, which by its terms was to be void if the plaintiff should procure additional insurance without notifying the insurer and having the same indorsed on the policy, if it appears that additional insurance was obtained at the time the policy was issued, and was not thereafter increased, and that the insurer, through the agent, knew the fact at the time, and with such knowledge paid a portion of the loss, the policy must be treated as valid. *Sherman v. Mad. Mut. Ins. Co.*, 104
2. Each of three policies of insurance upon the same live stock contained the provision that the company issuing it should be liable only for such a proportion of any loss as the amount insured by it should bear to the whole amount of insurance on the property. One policy insured the stock generally in the sum of \$1,500. Of the other two, each in the sum of \$1,666.67, one provided that no animal should be valued at more than \$500, and the other, that the insurer should pay no more than \$500 loss on any one animal. The insured lost by fire two steers valued at \$336, and one bull valued at \$2,000. *Held*, in an action on the \$1,500 policy,
 - (1) That plaintiff was entitled to recover from the three insurers the whole amount of his loss.
 - (2) That each of the insurers is liable to him for that proportion of the value of the two steers, which the whole amount insured by its policy bears to the whole amount insured by the three policies together.
 - (3) That as to the value of the bull lost, the liability of one of the other

- insurers being limited to \$500, while that of the second is limited to its proportion of \$500 as the stipulated value of the animal, defendant is liable for such additional sum as will make good the whole loss of \$2,000 upon the animal. *Ibid.*
3. Whether the rule for the adjustment of losses in such cases may be proved by the testimony of experts, is not here decided. *Ibid.*
 4. A condition in a policy of a mutual insurance company, that "when a note is taken for the cash premium, if it is not paid within sixty days after due, all obligations of the company to the insured, until such note is paid, are suspended," *held valid. Joliffe v. Mad. Mut. Ins. Co., 111*
 5. If such condition had further provided that in case of default the whole cash premium *should be considered earned*, acceptance of the whole amount by the insurer after a loss *would not be a waiver* of the condition, or make the insurer liable for such loss; although such payment during the life of the policy would revive the risk from the date of the payment as to all of the insured property then remaining. *Ibid.*
 6. During the suspension of a policy, no premium is earned; and in the absence of a stipulation making the whole premium due on default as above described, acceptance of the whole after default, with notice of a loss which occurred during the default, *is a waiver* of the condition, and makes the insurer liable; such acceptance being inconsistent with any claim that the risk was suspended when the loss occurred. *Ibid.*
 7. An assessment by defendant on the premium notes of persons to whom it has issued policies, being payable absolutely, whether such policies have been forfeited or not, an acceptance of such a payment after a loss of which the company has notice, is not a waiver of any forfeiture. *Ibid.*
 8. Forfeitures are not favored in the law; and where one party to a contract has the option to declare it forfeited on breach of its conditions by the other, his declaration of a forfeiture must be made *unconditionally*, and in plain and positive terms. *Ibid.*
 9. By defendant's by-laws, its *directors* may at their option annul a policy of insurance, upon failure of the insured to pay an assessment upon his premium note within thirty days after demand. On December 11, 1871, the *executive committee* of the directors adopted a resolution, "that all policies upon which the assessment levied on the 19th of January, 1871, are not paid before the 31st of December, 1871, be annulled on that day." An assessment had been levied on the policy in suit on said 19th of January, 1871; and due notice of the resolution was given the insured. *Held*, that even if the executive committee had power to annul policies in such cases, the resolution and notice were a mere threat as to their future action, and not a valid exercise of their option. *Ibid.*
 10. Defendant's charter provides that policies and contracts may be signed and attested, "and all other business of said corporation may be conducted, by committees or otherwise, without the presence of the board of directors, and shall be binding on the said corporation if the same be done under or in conformity to" its by-laws and ordinances. The by-laws make it the duty of the executive committee "to determine upon and audit all accounts presented against the company for payment, and generally transact all business of the company, in the absence of the board of directors, not inconsistent with the by-laws." *LYON, J., is of opinion*

that the committee had no power to declare policies forfeited for non-payment of assessments; but the question is not here decided. *Ibid.*

11. In an action on a policy of fire insurance, it appeared that plaintiff gave his note for the amount of the cash premium, with an agreement therein that if it were not paid at maturity, the whole amount of the premium should be considered as earned, and the policy be void while the note remained overdue and unpaid; and that the note matured before the loss complained of, and had never been paid. *Held*, that the insurer was not liable. *Gorton v. Dodge Co. Mut. Ins. Co.*, 121
12. Plaintiff, having insurance in a Chicago company on certain property for five years from February 14, 1874, for which he had paid the premium in full, procured from the defendant company a policy of insurance for three years on the same property for the same amount, dated January 5, 1875, paying the premium therefor, and delivering to defendant the Chicago policy with an indorsement requesting the Chicago company to cancel it; and this policy, thus indorsed, was immediately mailed by defendant's agent, for the plaintiff, to the Chicago company. The property was destroyed by fire March 19, 1875, and afterwards plaintiff received a notice from the Chicago company, dated January 10, but postmarked March 20, 1875, that it refused to cancel the policy. *Held*, that said policy had been cancelled by plaintiff on his part; that the Chicago company, by its silence for two and a half months, and until after the property was destroyed, was estopped from denying that it had assented to the cancellation; and that defendant is liable for the loss, even if the validity of its policy depended upon such cancellation. *Walters v. St. J. F. & M. Ins. Co.*, 489

(C.) *Insurance of Life.*

1. A policy of life insurance recites that in consideration of the annual premium therein stipulated, consisting of an annual cash premium, and an annual loan note, with interest, to be paid and given during ten years next after the date of the policy, the company assured the life of plaintiff's intestate to a certain amount for the term of his natural life. It declares that at each distribution of the surplus after its date, a due proportion of such surplus on each year's business during the continuance of the policy, will be returned to the assured, and that if default shall be made in the payment of any premium, the company will pay as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default; but that in order to secure such proportion, "all premium notes must be taken up, or the interest thereon be paid annually in cash, on the date of the annual maturity of the premium or within three months thereafter, until the notes are cancelled by returns of the surplus, or the whole policy will be forfeited, unless one or more annual payments have been made in full, by cash payment or by application of the dividend." One of the conditions of the policy was, that if the premiums, or the interest upon any note given therefor, should not be paid on the day named for their payment, "the company should not be liable for the payment of the whole sum assured, but only upon such part thereof as is stipulated above," and the remainder should cease and determine. There was indorsed on the policy this statement: "At the third annual renewal, the dividend of the first year will be due, and on the cash policies can be applied as cash towards the payment of the third year's premium, * * and on note policies will be applied first to pay the unpaid interest on the loan notes, and then to the notes themselves. * * THIS POLICY IS NONFORFEITABLE.

Each complete yearly payment secures its proportion of the policy." The loan note contains a promise by the assured to pay the amount therein named with interest, "*which interest shall be paid annually or the policy be forfeited.*" The assured paid the cash premiums for three years, and gave in each of said years his annual loan note as required; but afterwards made default in a payment due September 29, 1873, by reason of which the policy is admitted to have lapsed as to seven-tenths of its amount. On the 29th of March, 1874, there was due the company as interest on outstanding loan notes \$24.80; but on the same day there was due the assured from the company \$51.15, dividend earned for the year 1872. The assured died December 14, 1874. *Held*, that the company is liable to pay to the administrator three-tenths of the amount insured. *Hull, Adm'r, v. N. W. Mut. Life Ins. Co.*, 397

2. Forfeitures are only enforced when it appears that this is the plain intent and meaning of the contract; and the words of a policy must be construed most strongly against the insurer; and if the policy contains repugnant conditions, the court must enforce those which are in favor of the assured and will prevent a forfeiture. *Ibid.*
3. By the terms of the policy, the assured was clearly entitled to have the dividend which fell due on the day when interest accrued on his loan note, applied first to the payment of such interest; and even if a forfeiture would have resulted on the failure to pay such interest (a point not decided), there was none in this case. *Ibid.*
4. Dividends due the insured are *cash*, and there is nothing in the policy which justifies the company in refusing to apply them in payment of interest on premium notes in such cases. *Ibid.*

INTEREST.

Interest not being allowable on plaintiff's account before the action was commenced (*Marsh v. Fraser*, 37 Wis., 149), such account cannot be made an offset as of an earlier date against his obligations to defendant, which drew interest by their terms; but interest on the full amount of such obligations, at the rate mentioned therein, must be computed in the first instance to the commencement of the action. And plaintiff was entitled to interest at the statutory rate, between the commencement of the action and the date of the referee's report, on the balance found to have been due him at the former date. *Yates v. Shepardson*, 173

JUDGE DE FACTO.

See CONSTITUTIONAL LAW, 12.

JUDGMENT.

See VERDICT.

- (A.) *Judgment on Foreclosure of Mortgage.*
See FORECLOSURE OF MORTGAGE, 1, 2.
- (B.) *Judgment on Foreclosure of Land Contract.*
See JUDGMENT (E.) I, 1.
VOL. XXXIX. — 46

(C.) *Arrest of Judgment.*

1. Where there is a special finding of facts upon which defendant is entitled to judgment notwithstanding a general verdict for plaintiff, the latter is not injured by an order of the court merely arresting judgment for him on the general verdict, even if it is irregular to arrest judgment in a civil action, under the code. *Lemke v. Ch. M. & St. P. R'y Co.*, 449
2. An order arresting judgment in plaintiff's favor held not appealable where it appeared that plaintiff was not entitled to such judgment. *Ibid.*

(D.) *Presumptions to Sustain Judgment.*

See APPEAL (C.), 4, 12, 15.

(E.) *Vacating Judgment.*

See JURISDICTION (C.), III, 4.

I. *In Trial Court.*

1. Upon a complaint for a strict foreclosure of a contract for the purchase of land of which plaintiff claimed to have the legal title, judgment was rendered in default of an answer, requiring defendant to pay the contract price, with interest, etc., within fifteen days, or, in default thereof, barring his rights. Upon affidavits excusing his default, defendant moved at the next term to set aside the judgment, and for leave to file an answer alleging that on the day of the date of said land contract, and for a long time previous, he was the owner of said land; that on that day he borrowed of the plaintiff the sum named in said contract, and, to secure payment of the same, executed and delivered to the plaintiff a deed of said land, and took from him the contract in question; that he was then a married man, said land was his homestead, and his wife did not execute or assent to his said deed, for which reason it was void; and that he had paid fifty dollars interest not allowed in the judgment. The court granted the motion on condition that defendant, within ninety days, deposit with the clerk for plaintiff the principal sum admitted by the answer to be due, with interest from the date of the contract, fifty dollars not to be paid by the clerk to the plaintiff until the further order of the court relative thereto, made after the final hearing of the action. On appeal by the defendant, *Held*,
 - (1) That the order should be so far modified as not to require defendant to deposit the fifty dollars alleged to have been paid.
 - (2) That if the facts stated in the answer are true, the deed and contract therein mentioned probably constitute a mortgage, upon the foreclosure of which the mortgagor would have a year to redeem from the sale; and the order should therefore be so modified as to give defendant a year for making his payment.
 - (3) That as the defense set up in the proposed answer affects the validity of the instruments as a security, the court did not err in requiring the defendant, as a condition of opening the judgment, to pay the sum admitted to be due. *Hanson v. Michelson*, 19 Wis., 499, distinguished. *Magoon v. Callahan*, 141
2. Defendant testifies that he gave the summons served on him herein to his attorney to defend the action, while the attorney testifies that defendant did not deliver to him such summons, but gave him to understand that none had been served. It appears, however, that defendant paid no

attention to the action for some eighteen months, until served with an order to show cause why judgment should not be rendered against him; that he then gave such order to his attorney to attend to it; but neither he nor his attorney paid any further attention to the subject until execution had issued. *Held*, that the court below did not abuse its discretion in refusing to set aside the judgment; the defendant's neglect not being excusable. *Grootemaat v. Tebel*, 576

II. In Supreme Court.

1. The rule of law governing all the courts of this state, including the supreme court, is, that as to all matters on which the mind of the court did act, or is presumed from the record to have acted, in the rendition of a judgment, it is precluded from altering its decision at a subsequent term, except as authorized by statute or by general rules of practice established by this court, having statutory force. *Pringie v. Dunn et al.*, 435
2. The provision of sec. 38, ch. 125, R. S., empowering courts, at any time within one year after notice thereof, to relieve a party from a judgment rendered against him through his mistake, excusable neglect, etc., has no application to judgments of this court on appeals. *Ibid.*
3. This court has no power to review its own judgments on appeals after the term at which they are rendered, unless the power is carried over to a subsequent term by motion for rehearing actually made within the rule, and brought to a hearing within the term at which it is made. But this does not prevent the correction of mere mistakes in the entry of judgment. *Ibid.*
4. Under ch. 264 of 1860—which requires the clerk of this court to remit appeal papers to the court below within thirty days after judgment here on the appeal, unless this court directs them to be retained for the purpose of a motion for a rehearing,—jurisdiction here of an appeal ceases when the papers are so remitted; and it ceases at the end of the thirty days, even when the record is *not actually remitted*, unless it is retained here *by order of the court* under the statute. *Ibid.*

(F.) Reversal of Judgment.

See ADMINISTRATORS, etc., 3. APPEAL (C.), 16, 17. BILLS AND NOTES, 6. CONSTITUTIONAL LAW, 13. CONTRACTS, 8 (8). EVIDENCE, 7. INFANCY, 5. NEW TRIAL. SALES (A.), 6, 7. VARIANCE.

1. Where the complaint states a cause of action, and there was evidence tending to prove its material averments, the verdict will not be disturbed by this court, although there was a preponderance of evidence against it. *Oleson v. Flom*, 75
2. A judgment will not be reversed for inaccuracies in the instructions given, by which the appellant could not have been injured. *Ibid.*
3. Where, upon an admissible theory of the case, the verdict is supported by the evidence, it will not be disturbed. *Merrill et al. v. Nightingale et al.*, 247
4. An error in admitting evidence tending to show that there was *no consideration* for an instrument sued on, is immaterial where the jury find the instrument a *forgery*. *Menk v. Steinfert*, 370

5. An erroneous ruling that the husband could not testify to acts done by him as the wife's agent when she was present, is immaterial where it appears that he was offered as a witness *generally* in the cause, and not specially as to matters in which he had acted as her agent. *Ibid.*
6. A judgment will not be reversed for an error in the charge which was immediately and fully corrected. *Ibid.*
7. A judgment will not be reversed because some proposition in the judge's charge to the jury was not strictly accurate, if upon the whole charge the jury could not have been misled as to the law applicable to the case presented by the appellant's evidence. *Scheike v. Johnson et al.*, 384
8. Although the law was correctly given to the jury in this case, the judgment must be reversed for the rejection of material evidence bearing on the question of fact. *Meyer et al. v. Hanchett*, 419
9. Where the undisputed evidence in a case would justify a direction to the jury to find for defendant, plaintiff cannot be injured by erroneous instructions. *Andrews, Ex'trix, v. Jenkins et al.*, 476
10. A judgment will not be reversed for a casual remark of the judge to the jury, which, even if inaccurate, had little importance in the case, and could not have misled the jury. *Kelly v. Berry et al.*, 669

(G.) *Relief against Judgment.*

See EQUITY, 7, 8.

(H.) *Action on Judgment.*

See CONTRACTS, 12.

JUDICIAL NOTICE.

See EVIDENCE, 16.

JURISDICTION.

(A.) *Of Supreme Court, in Appeals.*

See APPEAL (C.), 13, 14. JUDGMENT (E.), II.

(B.) *Of State and Federal Courts.*

See BANKRUPTCY.

(C.) *Of Circuit Courts.*

See WAIVER, 2, 3.

I. *In Divorces.*

See DIVORCE, 4, 5, 9.

II. *Over Judgments.*

See JUDGMENT (E.), II, 1.

III. *Of the Person.*

1. Courts of record of this state, in actions upon contract, may obtain jurisdiction of a nonresident defendant, having property in this state, by service of summons by publication; but the statute providing for such service (R. S., ch. 124, sec. 10) must be strictly followed. *Likens v. McCormick et al.*, 313
2. After the order of publication in this case, a copy of summons and complaint was mailed to defendants, by their firm name, giving the initials only of their Christian names, which were known to the plaintiff. *Held*, (1) That if a copy had been so directed and mailed to each of them, it would have been a doubtful service. *Kellam v. Toms*, 38 Wis., 592. (2) That the mailing of one copy to both could operate at best, as service on one only, not affecting the other; and the uncertainty which, if either, might receive the copy so mailed, makes it *prima facie* void as to both. *Ibid.*
3. A subsequent personal service on one of the defendants, without this state, with no attempt to serve the other, was not a sufficient compliance with the statute. *Ibid.*
4. Judgment as upon default having been rendered against the defendants after the attempts at service above described, they were entitled to have it opened, for the irregularity. *Ibid.*

(D.) *Of Circuit Judge at Chambers.*

See ARREST, 1. CONSTITUTIONAL LAW, 1, 2.

(E.) *Of Justices' Courts.*

See APPEAL (C.), 16, 17. RAILROADS, 1.

JUSTICES' COURTS.

See APPEAL (C.), 16, 17. RAILROADS, 1.

LACHES.

See EQUITY, 8. JUDGMENT (E.), 1, 2.

LAND CONTRACT.

See EQUITY, 2-6. VENDOR AND PURCHASER.

LANDLORD AND TENANT.

See MINES, etc.

LIBEL.

1. In an action for libel, where it is uncertain what words charged mean, and to whom they refer, the complaint should contain averments showing their meaning and their reference to the plaintiff. *Cory et al. v. Allen et al.*, 481
2. Words which have a direct tendency to injure a person in reputation, to degrade and disgrace him in society, and to bring him into public contempt and ridicule, are libelous. *Ibid.*

8. Defendants, in a newspaper article, after stating the defalcation, frauds and disappearance of one H., said: "It is currently rumored that Mrs. B. [one of the plaintiffs] has gone with H., or has some connection with his disappearance. It is said that Mrs B. left shortly before H.'s departure, ostensibly for the purpose of visiting Washington, and since that time her family have telegraphed to her and for her repeatedly, but can receive no tidings whatever of her whereabouts. H. was known to have possession of considerable of her money at the time he absconded, and the fact of her leaving and subsequent reticence, coupled with this, has given rumors to the effect that they had concocted a scheme to meet at some appointed time and place, and have gone together. For the lady's sake it is but proper to give but little credence to such a suspicion, until further developments shall prove it well founded." *Held*, libelous. *Ibid*.

LIEN.

(A.) *Upon Land.*

I. *Of Vendor.*

See EQUITY, 4.

II. *For Improvements.*

See BETTERMENT ACT.

(B.) *Upon Personalty.*

I. *On Goods sold by General Owner.*

See SALES (A.), 1, 2.

II. *Of Laborer upon Logs.*

1. The statutes of 1800, 1862 and 1869, relating to liens upon logs for labor or services connected therewith, are valid; and where the laborer is not employed by the general owner of the logs, or of the land on which they are cut, but by a contractor under him, proceedings to enforce the lien are not invalid because such general owner is not made a party. *Munger v. Lenroot*, 32 Wis., 541, adhered to. *Winslow et al. v. Urquhart*, 260
2. A judgment for the plaintiff in such an action does not estop the general owner of the logs from denying the right of such plaintiff to a lien upon them, in replevin by such owner against the purchaser under the judgment. *Ibid*.
3. In replevin for logs, where defendant claims under a judgment of a justice's court to enforce an alleged lien on the logs, which is regular on its face, such judgment must be held valid, unless the contrary affirmatively appears; and all reasonable presumptions consistent with the record will be made, to sustain it. *Ibid*.
4. The statute (Tay. Stats., 1768, § 25) gives to any person "that shall furnish any supplies, or that may do or perform any labor or services in cutting, falling, hauling, driving, running, rafting, booming, cribbing, or towing any logs or timber," a lien on them "for the amount due for such supplies, labor or services." *Held*, that these terms include an amount due under contract for cooking food for the men engaged in driving the logs. *Ibid*.
5. The *affidavit* for an attachment in this case, after stating the sum due plaintiff from defendant above all legal setoffs, adds, "that said indebted-

edness is due for labor and services performed by plaintiff for the defendant in and about cooking for men driving pine logs," etc., and does not otherwise show that it was "due upon contract, express or implied." *Held*, sufficient under Tay. Stats., 1769-70, §§ 28, 33. *Blackwood v. Jones*, 27 Wis., 498, distinguished. *Ibid.*

6. The affidavit for the attachment (under the act of 1862, as amended) showing that the petition for a lien upon the logs in dispute was duly filed in the office of the clerk of the circuit court of the proper county (viz., that in which the services were rendered, and in which the logs remained until seized on the attachment), it is not necessary to state that it was recorded in the office of the lumber inspector for the proper district; and it seems that such recording is not essential to the validity of the lien. *Ibid.*

LIFE INSURANCE.

See INSURANCE (C.).

LIMITATION OF ACTIONS

See ADVERSE POSSESSION. DIVORCE, 16, 17. TAX CERTIFICATES, 2, 3.

1. The "disability" which prevented the statute of limitations upon actions for the recovery of real property from running in cases of infancy, insanity, imprisonment and coverture, by the law of this state found as sec. 13, ch. 138, R. S. (but now repealed by ch. 44, Laws of 1872), did not necessarily mean an "incapacity to do a legal act," but related also to the condition of a party subject to legal "duress," or to the control and protection of other persons; and such disability still existed in the case of a married woman (before the act of 1872), notwithstanding the statute concerning the "rights of married women" (Laws of 1850, ch. 44; Tay. Stats., 1185), which gave to a wife the absolute control of her separate estate the same as though she were unmarried, and notwithstanding sec. 15, ch. 122, R. S., which permitted her to sue alone in respect to such estate. *Wiesner v. Zaun*, 188
2. If plaintiff had been an unmarried woman at the time of the death of tenant by the curtesy, in 1857, she being then of age, and the defendant or his grantor being in actual adverse possession of the whole land under the deed of such tenant, her rights would have been barred by the statute in 1867. But she being then and ever since a married woman, the statute did not commence to run against her until ch. 44, Laws of 1872, took effect. *Ibid.*
3. Where a claim against a county, barred by the statute of limitations, was rejected by the supervisors without any statement of the grounds of rejection, there was no abuse of discretion in permitting the supervisors to file an answer setting up the statute, on an appeal to the circuit court from their decision. *Baker v. Super's of Columbia Co.*, 444
4. In case of an adverse possession of land, when the statute of limitations begins to run against the ancestor, it will continue to run against the heir, although he is under the disability of infancy when the right accrues to him. R. S., ch. 138, sec. 13. *SweARINGEN v. ROBERTSON*, 462

LIQUIDATED DAMAGES OR PENALTY?

See BOND, 1.

LIS PENDENS.

1. In case of a suit in equity to have certain conveyances held for mortgages only, and certain others held void, notice of *lis pendens* was filed, stating the parties and the nature of the suit, enumerating the several conveyances involved, and describing the land conveyed by each conveyance. *Held*, that if the notice had stopped there, it would have been a sufficient compliance with the statute (R. S., ch. 134, sec. 7). *Watson v. Wilcox*, 643
2. The notice, however, adds a conclusion, stating that "the following real estate is intended to be affected" by the action, and thereupon gives a wrong description, substituting, by a clerical error, the word *north* for *south*, and so describes lands not included in said conveyances. *Held*, that this needless and false conclusion does not vitiate the notice. *Spraggon v. McGreer*, 14 Wis., 439, distinguished. *Ibid*.

MARRIED WOMAN.

See LIMITATION OF ACTIONS, 1, 2.

MARSHALLING OF SECURITIES.

See FORECLOSURE OF MORTGAGE, 4.

MINES—MINING LEASES.

1. A mining lease of an exclusive right to mine upon the "Watkins range or works" on the lessor's land, *held* to convey a right not only to mine on the said range as far as it had been actually opened and worked, but also to follow it to the limits of said land. *Sobey et al. v. Thomas et al.*, 317
2. Such lease, however, did not convey the exclusive right to work a vein on another portion of said tract, between which and the former no connection exists *within the said tract*, although, since the lease, a connection between them has been traced, by a circuitous course, through adjoining land of another person; and this conclusion is not affected by the fact that the ores in the "Watkins range" are in a horizontal seam. *Ibid*.
3. The statutes governing the rights of miners (ch. 260 of 1860, and ch. 117 of 1872) apply only where there is no contract fixing the rights of the parties; and sec. 3 of the earlier act (as amended by sec. 2 of the later) gives the lessees in this case no right not included in their lease as here construed. *Ibid*.

MISJOINDER.

See INJUNCTION, 2 (2).

MORTGAGE.

See FORECLOSURE OF MORTGAGE. JUDGMENT (E.), I. 1. SUBROGATION.

NAVIGABLE RIVERS.

See HIGHWAYS, 1.

NEGLIGENCE.

See **BILLS AND NOTES**, 6.

1. The general rule is, that a party cannot recover for an injury of which his own negligence was in whole or in part the proximate cause. Whether *McCall v. Chamberlain*, 13 Wis., 637, creates an exception to this rule, and whether the doctrine of that case would be followed by this court in a similar case, are questions not here determined. *Fitzner v. Shinnick*, 129
2. Under sec. 32, ch. 119, Laws of 1872, which declares that any person who shall open bars or gates on a railroad farm crossing, and not immediately close the same, shall be liable to the party injured for all damages resulting from such act, one whose cattle have escaped upon a railroad through such open bars or gate, and have there been killed by a train, cannot recover from the person by whose fault such bars or gate were left open, if he had negligently suffered the cattle to escape from his own premises to the farm of another, on which such railroad crossing is situate. *Ibid.*
3. Questions of negligence are for the jury, unless the proof is conclusive; and upon the evidence in this case it was error to nonsuit the plaintiff on the ground that he was guilty of contributory negligence. *Ibid.*

NEW TRIAL.

1. On reversing a judgment in replevin for the plaintiff, the value of the property not having been determined on the trial, and not being ascertainable from the record here, the cause is remanded for a new trial. *Winslow et al. v. Urquhart*, 260
2. The record not showing the amount for which defendant is liable, this court, on reversing a judgment in his favor, rendered on a trial without a jury, remands the case for a new trial. *Stahl v. O'Malley et al.*, 328
3. The question in this case having arisen entirely on the findings of the trial court, and the evidence not being before this court, the judgment for the plaintiff is reversed, and the cause remanded with a suggestion that the circuit court grant a new trial, if satisfied that justice would thereby be promoted, but that otherwise it dismiss the complaint. *Pike v. Vaughn et al.*, 499
4. In reversing so much of the judgment herein as declares the judgment sued upon to be satisfied to the extent of the \$4,100 paid by F. on his said contract, and enjoins plaintiffs from seeking to collect that amount, this court directs the trial court to permit an amendment of the answer by inserting therein an equitable counterclaim founded on the contract between F. and plaintiffs, and the subsequent payments thereon, and upon such amendment, made within a reasonable time, to award a new trial; otherwise, to render judgment for plaintiffs for the amount of the judgment in suit, less \$6,500. *Stowell et al. v. Eldred*, 614

NON JUDEX.

See **CONSTITUTIONAL LAW**, 9-13.

NONSUIT.

See APPEAL (C.), 12. INSURANCE (A.), 1. NEGLIGENCE, 3.

NOTICE.

1. *Of Pendency of Action.*

See LIS PENDENS.

2. *Of Incumbrances.*

See SALES (A.), 1.

3. *Of Option, on default.*

See BOND, 2. CONTRACTS, 12 (1).

OFFICER.

See ATTORNEYS-AT-LAW, 6, 7. CONSTITUTIONAL LAW, 3-5. TOWN TREASURER.

1. The receiptor of property seized on process is not liable to the officer for nondelivery of the property to him on demand, unless the officer is liable to some one for his failure to hold or sell the property on his process; and this doctrine is applicable where such property belongs to the receiptor. *Perry v. Williams*, 339

2. Under circumstances which estop the receiptor to deny his liability to the officer for the property covered by the receipt, the officer is liable to account to the creditor for such property. *Ibid.*

3. If the receiptor conceals from the officer his ownership and suffers the goods to be seized as property of the defendant (thus preventing, perhaps, a levy upon other property), he is *estopped* from claiming the goods as his own when sued on the receipt; but where the receipt does not admit that the defendant in the process is owner of the goods, and the receiptor at the time asserts ownership in himself, he is not estopped from setting up such ownership as a bar to an action upon the receipt. *Ibid.*

OFFICER DE FACTO.

See CONSTITUTIONAL LAW, 12. CORPORATIONS (A.), 1.

PARTITION:

See PARTNERSHIP, 4.

PARTIES DEFENDANT.

See FORECLOSURE OF MORTGAGE, 2, 3.

PARTNERSHIP.

See EXEMPTION, 1-3.

- 1. As a general rule, so far as the partners and creditors of a firm are concerned, real estate of the partnership is in equity deemed mere person-

- alty; and in case of a dissolution, it is often decreed to be sold, as a proper method of ascertaining its value and making an equal distribution of the partnership effects. *Pierce et al. v. Covert, imp.*, 252
2. But where partners have taken title to real estate as tenants in common, and all debts due to third persons and between themselves have been discharged, and an equal distribution of the assets can be made without a sale of the real estate, such a sale need not be ordered on a dissolution, unless it appears that such an order would be most beneficial to the partners. *Ibid.*
 3. In this action for the dissolution of a partnership, it appeared that the assets in money, notes and accounts were much more than sufficient to pay all debts, and that title to real estate of the firm had been taken by the partners in their individual names as tenants in common; that one of the partners was dead, and his personal representatives, heirs and widow are made parties to the action; and that another of the partners had conveyed his undivided third of the real property, to one G. C., not a member of the firm, who is made defendant. The complaint alleges that the real estate cannot be divided without great prejudice to the owners, but there is no pretense that a sale is necessary for an equal distribution of the assets. *Held*, that the court erred in ordering G. C. to convey his undivided one-third of the real property to the receiver appointed in the action. *Ibid.*
 4. An action for the dissolution of a partnership and a settlement of its affairs should not be complicated by proceedings therein for the partition of real property. *Ibid.*

PENALTY OR LIQUIDATED DAMAGES?

See BOND, 1.

PLACE OF TRIAL.

See CHANGE OF VENUE.

PLEADING.

See ADMINISTRATORS, etc., 2, 5, 6. AMENDMENT OF PLEADING. COSTS, 3. COUNTERCLAIM. DIVORCE, 12-15, 17, 18, 21. EJECTMENT, 1-3. LIBEL, 1. LIMITATION OF ACTIONS, 3. VARIANCE. WAIVER, 2.

1. Under the statute, a counterclaim in the answer is a *pleading to the complaint*; and where the latter discloses want of jurisdiction, or fails to state a cause of action, a demurrer to a counterclaim goes back to the complaint. *Lowe v. Hyde*, 345
2. A husband is not liable for necessities furnished his wife without his consent, except under special circumstances. *Brown v. Worden*, 432
3. In an action against the husband, therefore, a complaint which merely alleges that the plaintiff furnished necessities to the wife at her request, and that their value "thereupon became due" from defendant to plaintiff, without stating the special circumstances which made him liable, is insufficient on demurrer *ore tenus* at the trial. *Ibid.*

4. If the complaint had averred that the goods were sold or furnished to the defendant, it seems that evidence would have been admissible under it to show that the wife was the authorized agent of her husband in purchasing them. *Ibid.*

PLEDGE.

1. The fact that plaintiff, on purchasing defendant's note and mortgage in suit, took capital stock in the defendant in pledge as collateral security, does not bind him to accept such stock in payment of the note, in the absence of any agreement to that effect. *Heath v. Silverthorn L. M. & S. Co.*, 146
2. The fact that plaintiff, while holding such stock in pledge, voted upon it at a stockholders' meeting, did not constitute a conversion of the stock by him; especially as it appears that he was requested by the president of the company (who knew that he held the stock as collateral security) to be present at such meeting and vote upon said stock. *Ibid.*

PRACTICE.

(A.) *At the Circuit.*

See AMENDMENT OF PLEADING. ARREST. ATTACHMENT. BETTERMENT ACT. CHANGE OF VENUE. CONSTITUTIONAL LAW, 1, 2, 9, 10. COSTS, 3. DAMAGES, 1, 2. EXCEPTIONS. JUDGMENT (C.), (E.). JURISDICTION (C.), III. LIEN (B.), II, 5, 6. LIMITATION OF ACTIONS, 3. LIS PENDENS. PARTNERSHIP, 4. VARIANCE. VERDICT. WAIVER, 3.

(B.) *In the Supreme Court.*

See APPEAL (C.), 3, 5-11, 13, 14. COSTS, 1, 2. DIVORCE, 22. EJECTMENT, 2.

PRESCRIPTION.

See ADVERSE POSSESSION. EVIDENCE, 5.

PRESUMPTION.

See APPEAL (C.), 1, 4, 12, 15. COMMON CARRIER, 2. CONSTITUTIONAL LAW, 11. CONTRACTS, 1. CONVERSION, 1. INSTRUCTIONS TO JURY. INSURANCE (A.), 4. SALES (A.), 4.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See TOWN TREASURER.

PRINTED CASE.

See APPEAL (C.), 3, 7, 10, 11.

PROBATE COURT.

See ADMINISTRATORS, etc.

PROCESS.

See ARREST. ATTACHMENT. EXEMPTION. JURISDICTION (C.), III.

RAILROADS.

1. Under sec. 10, ch. 119 of 1872, as amended by sec. 1, ch. 246 of 1873, the relation of a railroad company to a person employed by its contractor to perform work in the construction of its road, is that of a guarantor (upon certain conditions specified in the statute) of payment for such work by such contractor (*Streubel v. Railway Co.*, 12 Wis., 67); and the employee's action against the company, as one "growing out of contract," may be brought *in justice's court*, for an amount not exceeding the justice's jurisdiction. R. S., ch. 120, sec. 5, subd. 1. *Redmond v. G. & S. W. R'y Co.*, 426
2. The term "contractor," in said act, includes subcontractors in the *second degree*, as well as those who contract directly with the company. *Ibid.*
3. As the statute peremptorily requires the action to be brought within fifty days after the labor is performed, it is immaterial whether at the commencement of the action there is anything yet due from the company to its contractor, or not. *Ibid.*
4. Where goods carried by a railroad company to their place of destination and there deposited in its warehouse, are kept safely for the consignee until he has had reasonable time to remove them, and are afterwards destroyed by fire, the company is not liable for them as a common carrier. *Lemke v. Ch., Mil. & St. P. R'y Co.*, 449
5. In the absence of proof to the contrary, the presumption is that goods are ready for delivery to a consignee at any time after they are received at the carrier's depot at their place of destination. *Ibid.*
6. The question whether the consignee had a reasonable time to remove his goods should be submitted to the jury, under proper instructions, when there is a conflict of evidence in respect to material facts bearing upon it, or when the facts are doubtful or complicated and the court cannot satisfactorily determine their weight or importance. But when the facts are few and simple, and are conclusively established by a special finding or by the undisputed evidence, the question of a reasonable time is for the court. *Ibid.*
7. Plaintiff's goods, shipped by defendant's road to Watertown, were received at the Watertown depot at 5:30 P. M., of Saturday, and were destroyed by fire in said depot about noon of the following Tuesday. *Held*, that plaintiff had a reasonable time to remove the goods, and defendant was not liable as a carrier. *Ibid.*
8. The fact that the consignee was absent from Watertown during most of the period between the arrival and destruction of the goods, could not extend the time during which defendant held them as a common carrier. *Ibid.*

RAILROAD CROSSINGS.

Under sec. 32, ch. 119, Laws of 1872, which declares that any person who shall open bars or gates on a railroad farm crossing, and not immediately close the same, shall be liable to the party injured for all damages resulting from such act, one whose cattle have escaped upon a railroad through such open bars or gate, and have there been killed by a train, cannot recover from the person by whose fault such bars or gate were left open, if he had negligently suffered the cattle to escape from his own premises to the farm of another, on which such railroad crossing is situate.
Pitzner v. Shinnick, 129

RECEIPT.

Upon a settlement between the parties, in 1849, plaintiff gave defendant his promissory note, in the usual form, for \$682.07, and took defendant's receipt, as follows: "Received of *Peter Yates*, on settlement, one dollar in full of all demands except a note of even date of \$682.07 and the rat trap." Plaintiff claims that the note represents advances made by defendant on account of a certain engine, here called the "rat trap;" that the agreement was, that payment should be made only out of the profits thereof; and that there were no profits. Defendant claims that the note was given unconditionally for the balance due him on the settlement. *Held*, that the note is in terms an unconditional promise to pay; and the legal effect of the receipt is the same as though it had specified that the note was given defendant in full settlement of all the business transactions of the parties, except those growing out of the engine adventure. *Yates v. Shepardson*, 173

RECEIPTOR.

1. The receiptor of property seized on process is not liable to the officer for nondelivery of the property to him on demand, unless the officer is liable to some one for his failure to hold or sell the property on his process; and this doctrine is applicable where such property belongs to the receiptor.
Perry v. Williams, 339
2. Under circumstances which estop the receiptor to deny his liability to the officer for the property covered by the receipt, the officer is liable to account to the creditor for such property. *Ibid.*
3. If the receiptor conceals from the officer his ownership and suffers the goods to be seized as property of the defendant (thus preventing, perhaps, a levy upon other property), he is *estopped* from claiming the goods as his own when sued on the receipt; but where the receipt does not admit that the defendant in the process is owner of the goods, and the receiptor at the time asserts ownership in himself, he is not estopped from setting up such ownership as a bar to an action upon the receipt.
Ibid.

RECORDS OF MUNICIPAL CORPORATIONS.

1. In passing judicially upon official records, where authority appears or is implied by law, they will be construed according to their intent, and it will be assumed that the proceedings were rightly had, in the absence of all suggestion in the record to the contrary. *State ex rel. Posey v. Sup'rs Crawford Co.*, 596
2. Where a board of supervisors resolved that an order be entered on its journal purporting that the board ordered and determined "as follows:" *Held*, that the board, *ipso facto*, ordered and determined what followed. *Ibid.*
3. The record of the proceedings of such a board contains this entry, as of a specified date: "Board met pursuant to adjournment. Roll called by clerk. Members all present;" and then states that a certain resolution was offered by a person named, and was passed, "all members voting in the affirmative but one." *Held*, that this record imports that the vote was by a full board, all the members except one voting for the resolution; and the court cannot intend facts inconsistent with it for the purpose of making it bad. *Ibid.*

REFERENCE.

See EXCEPTIONS, 2.

REHEARING.

See JUDGMENT (E.), II.

1. Under sec. 7, ch. 264 of 1860, this court loses jurisdiction of appeals in thirty days after judgment on them here, unless the jurisdiction is retained by order of the court for the purpose of a motion for rehearing, made within that time (*Pringle v. Dunn*, ante, p. 435); and this applies where the judgment here is one dismissing the appeal for noncompliance with the rules. *Pierce v. Kelly, imp.*, 568
2. Where a motion for a rehearing is made after this court has lost jurisdiction of the action, it cannot entertain the motion, nor deny it with costs; and in such a case it denies the motion without costs. *Ibid.*

"RELATIONS."

See WILLS, 1.

REMITTITUR.

Under ch. 264 of 1860—which requires the clerk of this court to remit appeal papers to the court below within thirty days after judgment here on the appeal, unless this court directs them to be retained for the purpose of a motion for a rehearing,—jurisdiction here of an appeal ceases when the papers are so remitted; and it ceases at the end of the thirty days, even when the record is not actually remitted, unless it is retained here by order of the court under the statute. *Pringle v. Dunn et al.*, 435

REPLEVIN.

See CONVERSION, 4. LIEN (B.), II, 2, 3. NEW TRIAL, 1.

1. In replevin for logs, where it appears that they were cut for defendant, without authority, on land of another person; that they afterwards passed into defendant's possession; that the owner of the land sold and conveyed them to the plaintiffs, who duly demanded them of the defendant; and that the latter refused to deliver them on such demand, or to pay for them, the court may direct a verdict for the plaintiffs. *Brewster et al. v. Carmichael*, 456
2. Proof of the value of the stampage may be rejected, and the rule of damages prescribed by ch. 263, Laws of 1873, applied, even where the logs were cut before that statute was enacted, and also before the decision of *Single v. Schneider*, 30 Wis., 570, which led to it. *Ibid.*
3. In replevin, where the property has been seized by the sheriff and then returned to defendant, under the statute, plaintiff, on proof of the unlawful taking and detention of the property described in the complaint, and of its value, may take judgment for such value with damages for the detention, without showing the identity of the property seized by the sheriff with that taken by the defendant. *Ibid.*
4. In such cases, the action is regarded as a concurrent remedy with trover, and to be governed by the same rules. *Ibid.*

RES ADJUDICATA.

See CHANGE OF VENUE, 3.

- On a former appeal from the order of the circuit court setting aside the referee's report, upon plaintiff's exceptions thereto, and ordering another reference, this court reversed the order, on the ground that "the circuit court should have reviewed the report, and the questions of law and fact arising upon the exceptions," and that it had not done so; and the cause was remanded "for the action of that court upon the report and exceptions." *Held*, that the questions raised by such exceptions are not *res adjudicatae* by virtue of such former decision. *Yates v. Shephardson*, 173

RESIDENCE.

1. Sec. 12, ch. 111, R. S., rests jurisdiction of actions for divorce in this state upon the residence of *the plaintiff* alone, and requires the plaintiff to have resided here one year immediately preceding the suit, except when the suit is for adultery committed while the plaintiff is a resident here, and when the marriage is solemnized here and plaintiff continues to reside here until suit brought. *Dutcher v. Dutcher*, 651
2. The legislature, in enacting this statute, was legislating for the citizens of this state, and not for others; and the residence required by it must in

each case be actual and *bona fide, animo manendi*; such a residence as, continuing for a year, would make a man a qualified elector of the state.

Ibid.

3. The rule that the domicile of the wife follows that of the husband, is inapplicable, at least under our statute, to a case of divorce, where the parties are actually living in different jurisdictions; and the fact that the husband's domicile has been in this state for many years will not enable the wife to sue for a divorce here, if she has continued to live in another state.

Ibid.

4. In such an action the plaintiff's want of residence under the statute is a *personal disability*, which may be cured, and is matter in *abatement* and not in bar of the action.

Ibid.

REVERSAL OF JUDGMENT.

See JUDGMENT (F.)

REVOCATION OF ORDER FOR WORK OR GOODS.

See CONTRACTS, 1.

RULES OF SUPREME COURT.

The rules requiring the brief on each side to contain a succinct statement of so much of the record as is essential to an understanding of the questions discussed, and the printed case to present an *abstract* of the material matters, will be enforced by a peremptory dismissal of the appeal or writ of error where there is a marked failure to comply with them. *Heath v. Silverthorn L. M. & S. Co.*, 146

SALES.

(A.) Of Personal Property.

See WARRANTY.

1. One who purchases personal property in good faith, for value, of the general owner in possession, without notice, actual or constructive, that it is incumbered, will hold it discharged of any prior incumbrance. *Andrews, Ex'trix, v. Jenkins et al.*, 476
2. K. agreed in writing to sell A. all the pine timber on a certain tract of land for a specified price. The next day, A. and G. entered into a written contract in respect to the same timber, which stated that G. proposed to go upon said tract and cut, drive and deliver at a certain boom all merchantable pine timber thereon; that for so doing G. should have what the logs would bring over and above the cost at the place of sale; and that, to keep the business through the winter, A. would advance money to carry it on, and all things provided or purchased with A.'s money should be his property until all debts and liens were paid. *Held*, that under such contract A. had only a special interest in or lien upon the logs for the amount of his advances, and G. was the general owner.

Ibid.

3. In general, where the vendor in a contract for the sale and delivery of logs is bound to ascertain the quantity by having the logs scaled, title does not pass to the vendee until all the logs are delivered and duly measured; but the parties may enter into a valid agreement that the title shall pass as fast as the logs are deposited in the place agreed upon for delivery; and in that case they will be at the vendee's risk from the time of such deposit, even though the vendor may still be bound to have them scaled. *Pike v. Vaughn et al.*, 499
4. Plaintiff agreed to purchase all the logs which one M. could deliver in a certain logging season, and M. got out logs and placed them at or near the point of delivery, which was upon his own land. The contract was silent as to where, when and by whom the logs should be scaled, and it does not appear that they were ever measured in fact. Plaintiff advanced to M., under the contract, goods and supplies to a considerable amount, prior to March 12th, which was the end of the logging season; and afterwards paid him considerable sums on account of the logs prior to the 8th of August. Before that day, the logs still being at the same place, M. sold and delivered a portion of them to V., who on that day took a part of them into his possession, and carried them away as his own. In an action against M. and V. for a conversion of the logs so carried away: *Held*, that the parties to the contract must be presumed to have intended that the logs should be examined by the purchaser, or at least that the quantity should be ascertained, before delivery to plaintiff, and acceptance by him; and that there was no complete sale to the plaintiff. *Ibid.*
5. The contract, which was by parol, not having been executed by a delivery and acceptance of the logs, was void by the statute of frauds, and subsequent payments did not take it out of the operation of the statute. *Ibid.*
6. Where lumber is sold without opportunity for examination by the vendee, there is an *implied warranty* that it is merchantable; and where there was evidence tending to show a sale under such circumstances, it was error to instruct the jury, in effect, that the vendee could not recover for any defect in the quality unless they should find that the vendor made representations which would amount to an *express warranty*. *Merriam v. Field*, 578
7. Such error was not cured by the fact that there was also evidence tending to show that the vendee took with full knowledge of the quality; it not appearing whether the jury found against him on that ground, or on the ground that there was no express warranty. *Ibid.*
8. Where, at the time of the vendor's offering to deliver property to the vendee according to contract, there are adverse liens upon the property, but the vendor furnishes security against them to the vendee's satisfaction, and the latter refuses to accept the property on the sole ground that it is of defective quality, this is a *waiver* of the objection founded on the existence of the liens. *Kelly v. Berry et al.*, 569
9. A contract for the sale of logs fixed \$10.50 per M. as the price of such of them as should average 250 feet each, and provided that a limited quantity of smaller logs might be delivered on the contract, the same to be appraised by a certain person. "the value to be based on the value of the \$10.50 logs." *Held*, that this did not require an *inspection* of the smaller logs by the person named, to determine their value with reference to their *quality*; but he was to determine the value of the *merchant-*

able logs of the smaller sizes, on the basis that merchantable logs averaging 250 feet were worth \$10.50 (the contract implying that all the logs were to be merchantable); and he might ascertain such sizes from the scale bills. *Ibid.*

(B.) Of Real Property.

See AGENCY. VENDOR AND PURCHASER.

SERVICE OF SUMMONS.

See JURISDICTION (C.), III.

SETOFF.

Interest not being allowable on plaintiff's account before the action was commenced (*Marsh v. Fraser*, 37 Wis., 149), such account cannot be made an offset as of an earlier date against his obligations to defendant, which drew interest by their terms; but interest on the full amount of such obligations, at the rate mentioned therein, must be computed in the first instance to the commencement of the action. And plaintiff was entitled to interest at the statutory rate, between the commencement of the action and the date of the referee's report, on the balance found to have been due him at the former date. *Yates v. Shepardson*, 173

SPECIFIC PERFORMANCE.

1. Specific performance of a contract of sale of land will not be enforced, unless the court is satisfied that the claim for a deed is fair and reasonable, and the contract equal in all its parts and founded on an adequate consideration. *Hay v. Lewis et al.*, 364
2. Before the land-owner's agent had accepted H.'s offer of \$450 for the land here in question, one T. had offered such agent \$550 for it; but H. objecting to the acceptance of T.'s offer, and insisting upon his own, T. withdrew his offer, and the agent accepted that of H., and gave a receipt for \$50 then paid, as a payment on the purchase price of the land. Afterwards T. purchased of the owner directly for \$600. *Held*, that the court will not require the title to be conveyed to H. or his assignee. *Ibid.*

STATUTES CITED, ETC.

SESSION LAWS.		1860. Ch. 362, " 5, - 409, 412, 413
1847. Page 5, - - - -	356	1861. " 243, - - - - 533, 535
1850. Ch. 44, - - - - 190, 206	1862.	1862. " 60, - - - - 586
1850. " 96, - - - - - 356	1862.	1862. " 101, sec. 1, - - - 412
1853. " 127, - - - - - 356	1862.	1862. " 116, - - - - - 87
1855. " 50, - - - - - 509, 511	1862.	1862. " 206, - - - - - 391
1857. " 27, - - - - - 430	1862.	1862. " 248, - - - - - 533, 535
1857. " 40, - - - - 79, 83, 84, 85	1863.	1863. " 233, - - - - - 281
1858. " 114, - - - - - 280	1864.	1864. " 167, sec. 12, - - - 269
1859. " 22, secs. 26, 27, 444, 448-9	1866. P. & L., Ch. 258, -	1866. P. & L., Ch. 258, - 147, 153
1860. " 260, - - - - - 317, 326	1867. Ch. 117, - - - - -	1867. Ch. 117, - - - - - 243
1860. " 264, - - - - - 435, 441	1868.	1868. " 37, secs. 2, 3, - - - 412
1860. " 264, sec. 7, - - 568, 569	1868.	1868. " 130, " 81, 83, - - - 332
1860. " 268, " 1, - - - 134	1869.	1869. " 185, - - - - - 313

1869. P. & L., Ch. 485, -	529, 532	Ch. 125, sec. 38,	435, 438, 440, 577
1870. Ch. 69, - - -	390, 391	" 125, " 40, - - -	414, 418
1870. " 79, - - -	243	" 127, " - - -	60
1870. " 133, - - -	512, 514	" 132, sec. 32, - - -	450, 453
1872. " 44, - - -	189, 190, 209	" 134, " 7, - - -	643, 647
1872. " 117, - - -	317, 326	" 137, " 130, - - -	187
1872. " 119, sec. 10, -	428	" 138, " 6, - - -	187, 546, 547
1872. " 119, " 32, -	129	" 138, secs. 6, 7, -	538, 543
1873. " 12, - - -	525, 526	" 138, " 6, 7, 10, -	189
1873. " 248, sec. 1, -	428	" 138, " 6-10, - - -	203
1873. " 263, - - -	456, 460	" 138, sec. 7, subd's. 1, 2, 546, 547	
1873. " 280, - - -	413	" 138, " 7, " 1, 2, 3, 543	
1873. " 280, sec. 1, -	409, 412	" 138, " 7, " 3, 4, 538, 543, 551	
1874. " 194, " 2, -	578, 584	" 138, " 7, subd. 4, 544, 546, 547	
1874. " 323, - - -	271, 281	" 138, " 13, 189, 206, 219, 462, 466	
1875. " 269, - - -	282	" 141, - - -	612
REVISED STATUTES OF 1839.		" 141, sec. 4, - - -	345
Page 185, § 39, - - -	205	" 141, secs. 30-33, - - -	600, 609, 611
" 260, § 13, - - -	466	" 141, " 30, 31, 32, - - -	612
" 264, - - -	60	" 141, sec. 31, - - -	611
REVISED STATUTES OF 1849.		" 141, " 33, - - -	601, 612, 613
Ch. 91, - - -	60	" 145, " 1, - - -	498
" 95, - - -	409, 413	" 164, secs. 39, 40, - - -	246
" 127, sec. 12, - - -	466	" 188, sec. 23, - - -	207
" 157, - - -	60	" 191, " 1, - - -	409, 413
REVISED STATUTES OF 1858.		Page 1055 (Appendix), - - -	413
Ch. 5, sec. 1, - - -	232	TAYLOR'S STATUTES.	
" 5, " 1, subd. 1, -	102	Page 361, - - -	67, 68, - 474
" 5, " 1, subd. 2, -	241	" 362, - - -	71, - 474
" 18, secs. 60, 61, -	332	" 363, - - -	76, - 468, 475
" 19, - - -	529, 532	" 370, - - -	113, - - 473
" 19, sec. 120, - - -	135	" 513, - - -	156, - - 135
" 37, " 1, - - -	246	" 757, - - -	19, - - 269
" 79, " 25, - - -	136	" 836, - - -	12, - - 533, 535
" 79, " 41, - - -	136	" 836, - - -	14, - - 533, 535
" 92, " 4, subd. 7, -	204	" 1051, - - -	57, - - 430
" 92, " 7, - - -	189	" 1170, - - -	1, subd. 6, 189 204
" 97, " 29, - - -	96, 99	" 1195, - - -	- - - 190, 296
" 99, " 120, - - -	269	" 1342, - - -	21, - - 533, 535
" 111, - - -	657	" 1343-4, - - -	31-33, - 241
" 111, sec. 12, - - -	651	" 1344-5, - - -	39, 40, - 509
" 111, " 13, subd. 3, -	652, 662	" 1423, - - -	5, - - 313
" 111, " 19, - - -	170	" 1425, - - -	14-16, - 413
" 111, " 20, - - -	170	" 1622-3, - - -	- - - 203
" 119, " 7, - - -	287	" 1624, - - -	13, - - 206
" 120, " 5, - - -	430	" 1635, - - -	11, - - 456
" 120, " 5, subd. 1, -	426	" 1720, - - -	25, - - 414, 417
" 122, " 15, - - -	190, 206	" 1768, - - -	25, - - 261, 267
" 123, " 4, - - -	309, 312	" 1769, - - -	28, - - 268
" 123, " 7, - - -	394	" 1769, - - -	27, 28, - 269
" 123, " 8, 391, 409, 411, 412		" 1769-70, - - -	28-33, - 261, 269
" 124, " 10, - - -	314	" 1772, - - -	41, - - 269
" 125, secs. 5, 8, - - -	652, 661	" 1976, - - -	23, - - 207

STATUTES, CONSTRUCTION OF.

See ATTORNEYS-AT-LAW, 3, 4. TOWN TREASURER, 5.

SUBROGATION.

- One, who, having no interest to protect, voluntarily loans money to a mortgagor for the purpose of satisfying and canceling the mortgage, taking a new mortgage for his own security, cannot have the former mortgage revived and himself subrogated to the rights of the mortgagee therein. *Watson v. Wilcox*, 643

SUMMONS.

1. Courts of record of this state, in actions upon contract, may obtain jurisdiction of a nonresident defendant, having property in this state, by service of summons by publication; but the statute providing for such service (R. S., ch. 124, sec. 10) must be strictly followed. *Likens v. McCormick et al.*, 813
2. After the order of publication in this case, a copy of summons and complaint was mailed to defendants, by their firm name, giving the initials only of their Christian names, which were known to the plaintiff. *Held*,
 - (1) That if a copy had been so directed and mailed to each of them, it would have been a doubtful service. *Kellam v. Toms*, 38 Wis., 592.
 - (2) That the mailing of one copy to both could operate at best, as service on one only, not affecting the other; and the uncertainty which, if either, might receive the copy so mailed, makes it *prima facie* void as to both. *Ibid.*
3. A subsequent personal service on one of the defendants, without this state, with no attempt to serve the other, was not a sufficient compliance with the statute. *Ibid.*
4. Judgment as upon default having been rendered against the defendants after the attempts at service above described, they were entitled to have it opened, for the irregularity. *Ibid.*

SUNDAY.

- By ch. 243 of 1861 (Tay. Stats., 836, § 12), commercial paper maturing on Sunday or on a legal holiday becomes due and payable on the next preceding secular day; and by analogy to this statute, where any other contract by its terms matures on a Sunday or legal holiday, it will be held to mature on the next preceding secular day. *Siegbert et al. v. Stiles*, 533

SURETY.

See TOWN TREASURER, 3-7.

TAX CERTIFICATES.

1. Tax certificates held void because the cost of revenue stamps thereon was included in the amount for which the land was sold. *Baker v. Supervisors of Columbia Co.*, 444
2. An action on tax certificates issued May 10, 1864, held to have been barred at the expiration of six years from that time, by ch. 112, Laws of 1867. A remark in *Wolff v. Supervisors*, 29 Wis., 79, overruled. *Ibid.*

3. Even under secs. 26, 27, ch. 22 of 1859, the period of limitation would begin to run from the discovery of any *fact* rendering the sale invalid, and would not be suspended by mere *error of law*. But the acts of 1867 and 1868 fixed the bar at six years from the "*date of sale*." *Ibid.*

TOLLS.

1. The right to collect tolls upon logs put into a river, granted by a statute, is a franchise, and like other property must have a certain owner. *Sellers v. Union Lumbering Co.*, 525
2. Ch. 12 of 1873, by its terms, authorizes any person, company, corporation, their successors or assigns, who shall, at a prescribed expense, have improved a certain river by prescribed works, and shall keep the same in repair, so as to facilitate the floating of logs, to collect certain tolls upon logs put into the river. *Held*, that the statute purports to grant the franchise, not to one person, or company of persons, or corporation, but to every person improving the river according to the terms of the statute, whether before or after its passage; and it is void for want of a *certain grantee*. *Ibid.*

TOWNS.

1. Ch. 458, P. & L. Laws of 1869, which attempts to take from the possession and control of the town officers in Chippewa county a portion of the moneys raised in their towns for highway purposes, and entrust its expenditure to the county board, contrary to the general law (ch. 19, R. S.), violates sec. 23, art. IV of the state constitution, which requires the system of town and county government to be as nearly *uniform* as practicable. *McRae v. Hogan et al.*, 529
2. A town is liable for defects anywhere in the worked and traveled part of a highway, although the same may be wide enough for three or teams abreast. *Matthews et ux. v. Town of Baraboo*, 674

TOWN TREASURER.

1. Where the warrant of the town clerk to the town treasurer commanded the latter to pay the county treasurer, as state tax, a certain sum, which appeared to be less than the aggregate of the several items of state tax carried out in the tax roll delivered with the warrant, and to retain, as such town treasurer, a certain sum, less than the aggregate of the several items of town tax in said tax roll, and to pay the balance of tax collected to the county treasurer, it was his duty to *execute the warrant as he received it*, and he had no authority to investigate or correct any errors therein. *Stahl v. O'Malley et al.*, 323
2. In an action by the county treasurer on such town treasurer's bond, for failure of the latter to pay over to the former the full amount which he was required to pay by said warrant, as county tax: *Held*, that defendant was liable, although it appeared, and was adjudged by the court, that the amounts of town and state tax named in the warrant were erroneous, and that defendant had paid to plaintiff the whole sum which the warrant should have commanded him to pay. *Ibid.*

3. The omission of the chairman of town supervisors to formally approve the town treasurer's bond as required by law, does not relieve the treasurer or his sureties from their liability on the bond. *Supervisors of Omro v. Kaime et al.*, 468
4. The liability of a surety cannot be indefinitely extended; and in case of an annual office, the surety is presumed to contract for the faithfulness of the officer only for the year for which he was chosen, and such further time as is reasonably sufficient for the election and qualification of his successor. *Ibid.*
5. The statutory provision (Tay. Stats., 363, § 76), that if a town treasurer shall refuse to serve, or if his office shall become vacant, the town supervisors "shall forthwith appoint a treasurer," does not require the board to act on the very day when the time for the treasurer elect to qualify expires without his having done so; especially where he has up to that day manifested an intention to serve. *Ibid.*
6. Under the laws of this state, a town treasurer holds his office for one year and until his successor is elected and qualified; and where such a treasurer, being elected his own successor, manifested an intention to hold for the second term, by taking the oath of office and filing his bond, but without sureties, and continued to act as such treasurer nearly two months after the time limited by law for qualifying for the second term, and neglected to pay over, to the successor then appointed, the moneys of the town in his hands: *Held*, that both he and his sureties were liable on his first bond, especially as the moneys for which he was in default came to his hands during his first term, and were during that term deposited in a bank, and were lost by the failure of such bank within one week after the expiration of the time given him to qualify for the second term. *Ibid.*
7. Where a town treasurer deposits the town money in a bank without authority of law, and it is lost by failure of the bank, he and his sureties cannot defend on the ground that he was not guilty of want of care or diligence in making such deposit. *Ibid.*

TROVER.

See CONVERSION, 3-5.

TRUST.

1. If the vendor of land transfers to another the purchaser's notes for the whole of the unpaid purchase money, he will hold the legal title in trust for the security of his assignee; and on failure of the purchaser to pay such notes at maturity, the assignee will be entitled not only to a strict foreclosure of the purchaser's equity of redemption, but to a judgment against the vendor enforcing the execution of such trust in some appropriate manner. *Ibid.*
2. Whether a mere *vendor's lien* will pass to and be enforceable by an assignee of the purchase-money debt, is not here considered. *Ibid.*
3. Where the vendor transfers only a *part* of the purchase-money notes, he will hold the legal title as trustee for his assignee *pro tanto*; and, after a strict foreclosure in his own behalf upon default in payment of the

notes by him retained, he will hold the absolute title to an undivided portion of the land as trustee for his assignee, the amount of the assignee's interest in the land being proportioned to his interest in the unpaid purchase money. *Ibid.*

4. In an action by the holder of a part of the purchase-money notes in such a case, it is error to adjudge the plaintiff's rights in the land *paramount* to those of the vendor, or to direct a sale of the land and a personal judgment against the vendor for a deficiency; but he should be adjudged to convey to the plaintiff the proper undivided part of the land, or, if he cannot do that, to make compensation therefor on equitable terms; and this relief should be granted where the necessary facts are alleged in the complaint, though the specific relief there demanded is a foreclosure and sale. *Ibid.*

VARIANCE.

1. The variance between a mere legal defense of payment and an equitable counterclaim for specific performance, is material and vital, and cannot be disregarded, or cured by summary amendment on the trial. *Stowell et al. v. Eldred*, 614
2. The complaint for injuries caused by a defective highway, charged the accident to a rock or stone, and the evidence, taken without objection, tended to show that the accident resulted from a stone, *or rut*, or both. *Held*,
 - (1) That if the question of variance had been raised on the trial, by objection to evidence of the rut, plaintiffs should have been permitted to amend according to the fact, before verdict.
 - (2) That the question of variance, not having been raised on the trial, was waived by the defendant, and could not be raised after verdict. So *held* where the defendant attempted to raise that question by exceptions to the charge, taken (under the statute) during the term, but after the jury was discharged.
 - (3) That if the complaint had not been amended after verdict, the judgment could not have been reversed for the variance, and such amendment therefore worked no injury to the defendant; and an affidavit of surprise made by defendant after verdict, pending a motion for a new trial, and before the allowance of such amendment, was too late for any purpose except as an appeal to the discretion of the court below on the motion for a new trial. *Matthews et ux. v. Town of Baraboo*, 674

VENDOR AND PURCHASER.

1. Where the vendor in a land contract is able, ready and willing, at the proper time, to convey the land, and offers to do so, but the vendee absolutely refuses to receive a deed or pay any part of the purchase money as agreed, the vendor may maintain an action on the contract without having actually made and tendered a deed. *McWilliams v. Brookens*, 334
2. In an action for the conversion of a dwelling house removed from the lot on which it was built to other land; the presumption is that it had been attached to the former lot and became attached to the latter, so as to form in each case part of the realty. *Northrup v. Trusk*, 515

3. The person who removed the house not having been a mere trespasser, but the equitable owner of the house and of the lot on which it was built, the house, while *in transitu* between the two lots, was personally, the subject of conversion. *Huebeckmann v. McHenry*, 29 Wis., 655, distinguished. *Ibid.*
4. *It seems* that one who had no possession, real or constructive, of the house while *in transitu*, but merely permitted it to be attached to his soil by the person who removed it, could not be held guilty of a conversion of the house. *Ibid.*
5. If one who is rightfully in possession of land under a contract of sale, after default in payment but before any foreclosure of his equity, dispose of a house, attached to such land (as by removing it to other land), the vendor in the land contract, having no possessory title to the house, cannot maintain replevin or trover therefor. *Ibid.*
6. If the purchaser in a land contract, before payment of the price, has no right as against the vendor to remove a building thereon, and so diminish the value of the security (as intimated in *Seatoft v. Anderson*, 28 Wis., 212), still the vendor's remedy in such a case is not by action for damages, but by proceeding to stay waste. *Fairbank v. Cudworth*, 33 Wis., 358. *Ibid.*

VENUE.

1. In a divorce suit not commenced in the county of defendant's residence, he is entitled to have the venue changed to that county, notwithstanding plaintiff's affidavit that the circuit judge thereof is prejudiced against her; although, upon renewal of such affidavit after the change of venue, she may be entitled to have the cause sent out of that circuit for trial. *Moe v. Moe*, 308
2. Where the summons is served on the defendant in his own county, his demand that the venue be changed to that county (under sec. 4, ch. 123, R. S.) does not operate as a stay of proceedings; and the court in which the action is, has authority, pending the motion for the change of venue, to order payment of temporary alimony and suit money. *Bonnell v. Gray*, 36 Wis., 574, followed. *Ibid.*
3. An order refusing to change the place of trial on account of the prejudice of the people of the county in which the action was brought, is appealable, and it may also be reviewed on appeal from the final judgment; and one such order made in an action does not bar a second like motion by the same party on the same ground. *Hackett v. Carter*, 38 Wis., 394. *Schattchneider v. Johnson et al.*, 387
4. The granting of a change of venue in such cases rests in the sound discretion of the court, acting upon its own knowledge and observation as well as upon the proofs presented; and its decision will not be reversed except for an abuse of discretion. *Ibid.*
5. Whether the petition of a party to an action, representing the judge to be related to the parties and necessarily and insensibly prejudiced in the case, but not praying a change of venue, properly raises the question of prejudice, is not here decided. *Van Slyke v. Mut. Fire Ins. Co.*, 390
6. Although the statute (R. S., ch. 123, sec. 8) gives a party to an action the

right to a change of the place of trial on the ground that the judge is prejudiced, and not because such party *believes or fears* that he is so, yet when the application is made *to the judge whose prejudice is alleged*, although alleged only upon belief, the place of trial must be changed, the statute making the averment in such case conclusive proof. *Seehawer v. City of Milwaukee*, 409

7. Under sec. 5, ch. 352 of 1860 (as reenacted by sec. 1, ch. 280 of 1873), in an action commenced in the circuit court for Milwaukee county, if either party entitles himself to a change of the place of trial for any of the reasons mentioned in said statute, the action must be sent to the county court of the same county, "unless it shall appear" that one of the same objections exists to trying such action before the judge of the county court. *Held*, that the affidavit of the party to the prejudice of the county judge is *not conclusive* in such a case, but the averment is traversable and subject to be adjudicated by the circuit court. *Ibid*.
8. No argument adverse to the foregoing conclusion can be drawn from ch. 95, R. S. of 1849; that statute having been repealed by sec 1, ch. 191, R. S. of 1858, although preserved in the appendix to that revision. *Ibid*.

VERDICT.

Where there is a special finding of facts inconsistent with the general verdict for the plaintiff, the former must control, and defendant is entitled to judgment. R. S., ch. 182, sec. 32. *Lenke v. Ch., M. & St. P. R'y Co.*, 449

VERIFICATION OF PLEADING.

Under ch. 60 of 1862 (which gives discretion to the circuit courts to allow costs upon verified complaints in cases within the jurisdiction of a justice, when the sum demanded shall exceed \$100), the verification of the original complaint claiming over \$100 is sufficient for the discretion of the circuit court to rest upon, though the complaint be afterwards amended in some particulars, not changing the cause of action nor reducing the amount claimed below \$100. *Power v. Rockwell*, 585

WAIVER.

See SALES (A.), 8.

1. Defendant gave his notes here in suit for the full purchase price of a reaper, after he had used and tested it during one season; but defends against the notes for breach of warranty as to the quality and capacity of the reaper. There was evidence that he gave them at the solicitation of plaintiff's agent, to enable the latter to settle with his principals, and upon a promise that it should make no difference in his liability. *Held*, that the giving of the notes was not *per se* a waiver of the breach of warranty. *Harrison, Judd & Co. v. Crocker*, 68
2. The action being for the balance of mutual accounts, one of the items was

for services rendered by a law firm of which plaintiff was a member, and no assignment of the claim to him was shown. No objections were taken to the item, either by demurrer or answer, on the ground of a defect of parties plaintiff or a misjoinder of causes of action. *Held*, that such objections were *waived*. *Yates v. Shepardson*, 173

3. Defendants, appearing for that purpose only, moved to vacate a judgment against them, on the ground that the court had not acquired jurisdiction of them. An order was thereupon made vacating the judgment, but setting a time for them to answer; and from this they took no appeal. *Held*, on plaintiff's appeal, that by such submission to the order, defendants waived the defect of jurisdiction; and the question presented here is not that of jurisdiction, but only whether the judgment was properly opened for irregularity. *Likens v. McCormick et al.*, 313
4. The common council of a city having ordained a change of the grade of numerous streets, in a part of the city in which plaintiff's lots were situate, and having executed the ordinance in part, plaintiff, who was suffering serious special injury from such *partial* execution, in order to relieve himself from such injury, signed a petition to the common council to have the street fronting his lots completed according to such grade. *Held*, that this was *not* a waiver of his right to damages for such change of grade. *Herzer v. City of Milwaukee*, 360
5. The referee having rejected certain items, and defendant having excepted merely to his failure to allow \$150 therefor, the court erred in allowing more than that sum. *Yates v. Shepardson*, 173
6. In an action on a fire insurance policy, which by its terms was to be void if the plaintiff should procure additional insurance without notifying the insurer and having the same indorsed on the policy, if it appears that additional insurance was obtained *at the time the policy was issued*, and was not thereafter increased, and that the insurer, through the agent, knew the fact at the time, and with such knowledge paid a portion of the loss, the policy must be treated as valid. *Sherman v. Mad. Mut. Ins. Co.*, 104
7. A condition in a policy of a mutual insurance company, that "when a note is taken for the cash premium, if it is not paid within sixty days after due, all obligations of the company to the insured, until such note is paid, are suspended," *held* valid. If such condition had further provided that in case of default the whole cash premium *should be considered earned*, acceptance of the whole amount by the insurer after a loss *would not be a waiver* of the condition, or make the insurer liable for such loss; although such payment during the life of the policy would revive the risk from the date of the payment as to all of the insured property then remaining. *Jokiffe v. Mad. Mut. Ins. Co.*, 111
8. During the suspension of a policy, no premium is earned; and in the absence of a stipulation making the whole premium due on default as above described, acceptance of the whole after default, with notice of a loss which occurred during the default, *is a waiver* of the condition, and makes the insurer liable; such acceptance being inconsistent with any claim that the risk was suspended when the loss occurred. *Ibid.*
9. An assessment by defendant on the premium notes of persons to whom it has issued policies, being payable absolutely, whether such policies have been forfeited or not, an acceptance of such a payment after a loss of which the company has notice, is not a waiver of any forfeiture. *Ibid*

WARRANTY.

See SALES (A.), 6. WAIVER, 1.

Where machinery, made to order, fails to answer the purpose for which the maker knew it was ordered, or fails to perform as warranted, the purchaser may relieve himself from liability to pay for it, by returning or offering to return it within a reasonable time; or may retain it, and, in an action for the contract price, recoup his damages for breach of the contract of warranty, including the difference between the actual value of the machinery and what its value would have been, had it been as warranted. *Merrill et al. v. Nightingale et al.*, 247

WASTE.

See CONVERSION, 5.

WILLS.

1. In sec. 29, ch. 97, R. S. (which provides that "when a devise or legacy shall be made to any child or other relation of the testator, and the devisee or legatee shall die before the testator, leaving issue who shall survive the testator, such issue shall take the estate so given"), the word "relation" includes only relations by consanguinity. *Cleaver et al. v. Cleaver et al.*, 96
2. The testator's wife having died before him, a bequest made to her by the will lapsed, although she left issue which survived him. *Ibid.*

WITNESS.

1. In an action by a married woman, her husband may testify in her behalf as to acts done by him as her agent, whether done in her presence or in her absence. *Menk v. Steinfert*, 370
2. On taking a conveyance of certain property from defendant's intestate, plaintiff caused to be assigned to him a certain mortgage belonging to her husband, executed by one L. Afterwards plaintiff reconveyed to the intestate his said property, and, about a year thereafter, L. paid his mortgage debt to plaintiff's husband, and received from him a satisfaction of the mortgage theretofore executed by the intestate. In the transactions concerning those conveyances, plaintiff's husband acted generally as her agent. *Held*, that in this action he could not testify that he did not act as her agent in receiving the payment of L.'s mortgage. *Ibid.*

89096555123



b89096555123a

84096555123



B89096555123A